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FEDERAL COÖPERATION WITH THE STATES  
UNDER THE COMMERCE CLAUSE





FEDERAL COÖPERATION  
WITH THE STATES UNDER THE  
COMMERCE CLAUSE ❀ ❀ ❀ ❀ ❀ ❀  
❀ ❀ ❀ ❀ ❀ *By* JOSEPH E. KALLENBACH

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## PREFACE

A WELL-KNOWN writer on American constitutional law observed recently that "if all the opinions, monographs, treatises and articles which have been written concerning the commerce clause of the Constitution were laid end to end, they would reach from confusion to futility." Another eminent scholar, the author of one of the most authoritative treatises on the commerce clause, concludes that the Supreme Court cases bearing on this part of the Constitution are "utter confusion." As one who has delved at some length in the judicial opinions, learned commentaries, and periodical literature dealing with the commerce power, I feel that their conclusions are well founded. No one should undertake lightly the task of surveying exhaustively the subject of state and federal powers in the regulation of foreign and interstate commerce. The paths of constitutional construction in this broad field of governmental action are devious, the obscurities profound, the inconsistencies many, and the suppositions and queries practically infinite.

It is therefore with a very real appreciation of these difficulties that I submit the results of my investigations. My purpose obviously has not been to survey the whole range of state and federal powers and relationships in the regulation of foreign and interstate commerce. It has been rather to trace the main lines of constitutional development with respect to the employment of federal powers under the commerce clause to supplement and support legislative action by the states. This particular aspect of federal-state relations has been treated in more or less piecemeal fashion in numerous articles and monographs. The present study is an attempt to draw together and organize more completely and more conclusively materials bearing upon the subject. Emphasis has been placed primarily upon the evolution of fundamental principles governing federal-state coöperation, rather than upon evaluation of particular regulative policies. Intergovernmental coöperation under the commerce clause is dealt with only in terms of federal support of state legislation through enactment of supplementary statutes. State legislative coöperation with the federal

government in the regulation of commerce is left unexplored, as is also the extremely important topic of federal-state administrative coöperation in this sphere.

I wish to acknowledge indebtedness to Professors Jesse S. Reeves, Everett S. Brown, Arthur W. Bromage, and Harold M. Dorr, all of the Department of Political Science of the University of Michigan, for encouragement, invaluable advice, and sound criticism offered during the course of this study. Needless to state, credit for whatever merit it may possess is due also in great measure to those whose works are cited in the text. My appreciation is expressed for the cooperation extended by the staff of the William W. Cook Legal Research Library of the University of Michigan Law School in making materials accessible; for the efficient services of Mrs. Ethlynn Sprentall in typing the manuscript; for the careful work of Dr. Eugene S. McCartney and Miss Grace Potter, of the University of Michigan Press, in editing it; for the generosity of the University of Michigan in providing funds for publication; and, finally, for encouragement and aid extended by my wife at various points in the prosecution of the undertaking. For such errors and shortcomings as may be found, I, myself, of course assume entire responsibility.

J. E. K.

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## CHAPTER I

### INTRODUCTION

IT IS a commonplace of American constitutional history that recognition of the need for a national system of commercial regulation was a major factor in bringing about the framing and adoption of the Constitution. The events leading up to the holding of the momentous assembly in Philadelphia in the summer of 1787 have been understood from the beginning to have been largely influenced by a desire to strengthen the national government's hand in managing the nation's commercial relations with other powers and to free commerce from vexatious and retaliatory regulations of the states. "Over whatever other interests of the country this government may diffuse its blessings," observed Webster in his argument before the Supreme Court in the great *Steamboat Monopoly Case*<sup>1</sup> in 1824, "it will always be true, as a matter of historical fact, that it had its immediate origin in the necessities of commerce; and for its immediate object, the relief of those necessities, by removing their causes, and by establishing a uniform and steady system." The same thought was echoed by the Court itself in many of the earlier decisions bearing upon the commerce clause of the Constitution.<sup>2</sup>

The influence of the commerce clause of the Constitution as a nationalizing force since 1789 is likewise a matter requiring no

<sup>1</sup> *Gibbons v. Ogden*, 9 Wheat. 1, 12-13 (U. S.) (1824).

<sup>2</sup> Concurring opinion of Johnson, J., in *Gibbons v. Ogden*, 9 Wheat. 1, 231: "If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints."

Marshall, Ch. J., in *Brown v. Maryland*, 12 Wheat. 419, 445 (U. S.) (1827): "It may be doubted, whether any of the evils proceeding from the feebleness of the federal government, contributed more to that great revolution which introduced the present system, than the deep and general conviction that commerce ought to be regulated by Congress."

Catron, J., in *The Passenger Cases*, 7 How. 283, 445 (U. S.) (1849): "Before the Constitution existed, the States taxed the commerce and intercourse of each other. This was the leading cause of abandoning the confederacy and forming the constitution—more than all other causes it led to the result."



demonstration. This clause has been of profound significance in the achievement of national political and economic unity and in the aggrandizement of national power at the expense of the states. Nevertheless, the states have by no means suffered uniformly a diminution of their authority through the interpretation of this clause and the exercise of power under it. The battle on the whole has been a losing one for the states, owing largely to the fact that powerful economic and social forces were at work on the side of concentration of power in the national government; but in some degree influences operating through this provision have tended to preserve in the states a measure of control over the nation's commerce.

State authority in interstate and foreign commercial regulation has been strengthened and protected through various means. In the first place, the states have been protected by the Supreme Court against encroachments by Congress into their domain of reserved powers. Acts passed by Congress under claim of authority from the commerce clause have been voided or restricted in operation by application of the Tenth Amendment guarantee.<sup>3</sup> Beginning with the case of *Willson v. Blackbird Creek Marsh Company*<sup>4</sup> the Court, moreover, has frequently upheld state legislation falling within the range of power covered by the commerce clause. Legislation of this character has been sustained as a proper exercise either of state police, revenue, or proprietary powers or of a concurrent regulatory authority over local phases of interstate and foreign commerce.<sup>5</sup>

Preservation of power in the states over matters affecting interstate and foreign commerce has also been accomplished by other means. In one instance state power was freed from the limitations of the commerce clause by the process of constitutional amendment.<sup>6</sup> State authority over some phases of commercial regulation has also

<sup>3</sup> Notable cases of the last fifty years include *United States v. E. C. Knight Co.*, 156 U. S. 1 (1895); *Illinois Central R. R. v. McKendree*, 203 U. S. 514 (1906); *The Employers' Liability Cases*, 207 U. S. 463 (1908); *Hammer v. Dagenhart*, 247 U. S. 251 (1918); *Texas v. Eastern Texas R. R.*, 255 U. S. 204 (1922); *Schechter v. United States*, 295 U. S. 495 (1935); *Carter v. Carter Coal Co.*, 298 U. S. 238 (1936).

<sup>4</sup> 2 Pet. 245 (U. S.) (1829).

<sup>5</sup> The cases on this point are quite numerous. On the general subject see Bernard C. Gavit, *The Commerce Clause of the United States Constitution* (1932), Chaps. IX-XIII.

<sup>6</sup> The Twenty-first Amendment reestablished state control over the liquor traffic, with special provisions removing all restraints arising from the commerce clause.

been sanctioned and buttressed through positive acts of the national government. Federal acquiescence in state regulation of commerce has been expressed in a variety of ways. It has become a common practice to include provisions in treaties expressly subjecting matters therein enumerated to regulation in accordance with "local" law. State laws applying to the policing of ports, to the entrance of foreign corporations for business purposes, and to consular privileges and exemptions have been dealt with in this fashion.<sup>7</sup> Congressional consent to state action relating to interstate and foreign commerce has been readily given under those clauses which specifically provide for the exercise of powers by the states with the approval of Congress. Congressional consent to the levying of tonnage duties for various purposes was extended freely in the first two decades following the adoption of the Constitution. The states have likewise had little difficulty in securing Congressional approval of interstate compacts which have had a bearing upon commercial affairs.<sup>8</sup>

Positive action by Congress under the commerce clause has also been instrumental in validating state legislation affecting foreign and interstate commerce. In adopting regulations on a given subject Congress has sometimes included clauses specifically denying that provisions of such federal regulatory measures are to be construed as barring state regulation. A development from this practice has been the passage of acts subjecting interstate shipments of various commodities to the operation of state laws while still in course of transit into a state. In such cases the courts have held that these shipments of goods have been "divested" of the immunity from state control which they would ordinarily have as a consequence of the exclusiveness of federal regulatory power over them.

Congress has gone even further in supporting state authority. Statutes have been passed which, in effect, adopt state laws as a part of a national system of regulation upon a given subject by authorizing the enforcement of a federal penalty for their violation. Closely related to federal laws of this type are those which recognize and give sanction to state laws pertaining directly to the conduct

<sup>7</sup> On the general subject see Nicholas P. Mitchell, *State Interests in American Treaties* (1936), Chaps. IV-V.

<sup>8</sup> See particularly the compacts dealing with navigation and port development in *Interstate Compacts, 1789-1936* (1936), published by the Council of State Governments.

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of interstate and foreign commerce by authorizing and directing federal administrative officials to avoid their infringement and to give aid in their enforcement. The effect of such federal statutes is not only to give expression to a Congressional view that the state acts involved are valid, but also to make them a part of the system of federal regulation. They raise the general question of the extent and nature of federal authority to sanction state laws and make them substantially a part of a national plan of regulation.

The Supreme Court has maintained consistently that Congress cannot delegate its legislative power to the states.<sup>9</sup> Nevertheless it has sustained these various types of permissive federal statutes against that contention. This has been accomplished only by a modification of the basic doctrine that the courts have full and exclusive authority in defining the limits of state power in commercial regulation under the Constitution. The Supreme Court has admitted Congress to some share of responsibility in this regard. Whether the Court is bound to follow Congressional direction on this point throughout the whole range of federal jurisdiction over interstate and foreign commerce has not yet been made clear.

The Supreme Court has also given countenance to the employment of the federal commerce power for the purpose of rendering state laws more effective. A form of federal-state coöperation under the commerce clause having potentially great significance in the development of intergovernmental relations has been made available. Long-accepted principles developed under the concept of "dual federalism" seem to be in the process of restatement and

<sup>9</sup> *Cooley v. Board of Wardens*, 12 How. 299, 318 (U. S.) (1851), *per* Curtis, J.: "If the Constitution excluded the States from making any law regulating commerce, certainly Congress cannot regrant, or in any manner reconvey to the States that power."

*In re Rahrer*, 140 U. S. 546, 560 (1890), *per* Fuller, Ch. J.: "It does not admit of argument that Congress can neither delegate its own powers nor enlarge those of a State."

*Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 164 (1920), *per* McReynolds, J.: "Congress cannot transfer its legislative power to the States—by nature this is non-delegable."

But see *contra*, *Butte City Water Co. v. Baker*, 196 U. S. 119 (1904), wherein the Court declared that Congress "might rightfully entrust to the local legislature the determination of minor matters" respecting the disposal of public lands. Congress was legislating in this instance under the clause of Article IV, sec. 3, of the Constitution granting it authority to "dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

modification. The concept of the national and state governments as separate entities, pursuing independent lines of action in their respective spheres, has been broken down in the regulation of interstate and foreign commerce. The federal government has been conceded power under the commerce clause to strengthen and, in effect, to extend the authority of the states by providing additional sanctions for their laws. The attitude of the Court on the employment of the commerce power to support state policies stands in contrast to its attitude on the use of the taxing power for the same purpose.<sup>10</sup>

Aside from questions concerning the constitutional theory of federal-state relationships, these coöperative acts under the commerce clause present important issues of policy. Legislation of this character has become a matter of increasing concern in view of the fact that its extension to subjects of great importance to the nation's economic welfare is being urged in some quarters. The methods of the new "coöperative federalism" are being brought forward as alternatives to direct and independent regulation by Congress. Impetus to this movement has been supplied in recent years by judicial hostility toward the extension of federal control over interstate commerce through a broadened concept of national authority under the commerce clause.

In the field of commercial regulation the desirability of making available to Congress choices of modes of action as varied as possible is readily apparent. The complexities of the problems of business and commercial regulation growing out of variations in local conditions, attitudes, and standards require more than a simple choice between the two alternatives of state and federal regulation. Excessive rigidity in the allocation of powers between the central authority and the component units is one of the fundamental weaknesses of federalism. Any devices making for the elimination of that weakness should be regarded with favor. To give the commercial regulatory power greater flexibility, to permit the states to exercise a wider range of authority by Congressional consent, to allow the federal authority to be used to support such policies as they adopt—all these tend to widen the range of Con-

<sup>10</sup> In *United States v. Constantine*, 296 U. S. 287 (1935), the Court held that Congress might not exact a heavier license tax from dealers conducting their businesses in violation of state laws than it required of dealers who were complying with them.

gressional choice in devising appropriate measures of control. Federal-state coöperative measures are not to be condemned merely because they are a substitute for direct uniform federal regulation or because they make the states somewhat dependent upon Congress in the exercise of their powers. Only a confirmed nationalist would uncompromisingly oppose the use of such measures on the ground that they are a subterfuge designed to perpetuate a decadent state power and actually defeat effective regulation. Only a blind and unregenerate advocate of states' rights would oppose them as making the states dependent upon the national government for a measure of their powers.

There is, however, a very real danger that these forms of coöperative regulation may be employed unwisely. They may be the means of preserving or creating a heterogeneous system of regulation which might to better advantage be superseded by a uniform national system. Competitions among the states in their regulations may be encouraged, to the detriment of the nation's commercial interests. The tendency of the states, particularly in recent years, to adopt police and revenue measures which are more or less thinly disguised discriminations favoring local industry and business has aroused much critical comment.<sup>11</sup> Undue encouragement to the states to move in this direction will inevitably result from a too liberal acquiescence by Congress in state control of interstate and foreign commerce. Carried too far, this policy may eventuate in the re-creation of the very conditions which the adoption of the Constitution was designed to bring to an end. Federal "coöperation" with the states under the commerce clause may well develop into encouragement of a policy of noncoöperation among the states themselves.

<sup>11</sup> See Frederick E. Melder, *State and Local Barriers to Interstate Commerce in the United States*, University of Maine Studies, Second Series, No. 43 (1937); George R. Taylor, Edgar L. Burtis, and Frederick V. Waugh, *Barriers to Internal Trade in Farm Products* (Bureau of Agricultural Economics, 1939); Marketing Laws Survey, *Comparative Charts of State Statutes Illustrating Barriers to Trade between States* (1939). The rising menace of interstate barriers to trade led the Council of State Governments to sponsor a National Conference on Interstate Trade Barriers at Chicago on April 5-7, 1939. The Conference, which had the strong endorsement of the President of the United States and other high federal officials, was attended by representatives from forty-four states and four territories. It adopted reports recommending state and federal action on eleven separate points to eliminate state trade barriers. *Proceedings of the National Conference on Interstate Trade Barriers* (1939), published by the Council of State Governments.

It is the purpose of this study to trace the development of federal-state cooperative legislation under the commerce clause, to analyze the judicial reasoning by which it has been sustained, and to consider its influence upon the development of the constitutional theory of American federalism. Any extended consideration of the merits of the policies represented in specific measures is beyond the scope of this study. Limits of space likewise prevent consideration of the administrative aspects of federal-state cooperation in this field.<sup>12</sup>

Whether for good or ill, judicial validation of the types of cooperative legislation covered in this study has tended in all probability toward reestablishment of the system of commercial control which the framers actually intended to create. Evidence seems to indicate that the intention of the framers was to vest in Congress only a paramount, not an exclusive, power to regulate interstate and foreign commerce. A cooperative system of commercial regulation was not foreign to the thinking of the framers and their contemporaries, as is evidenced by their views on federal-state relations in general.<sup>13</sup> Whether or not it will be wise and expedient to exploit more fully these regulative devices of the "new federalism" remains to be seen. In any event, the constitutional foundation has been laid for a close coordination of federal and state legislative action in the commercial sphere.

<sup>12</sup> On this aspect of the subject see Jane Perry Clark, *The Rise of a New Federalism Federal-State Cooperation in the United States* (1938). See also Martin L. Lindahl, "Cooperation between the Interstate Commerce Commission and State Commissions in Railroad Regulation," 33 *Michigan Law Rev.* 338 (Jan., 1935), and Paul G. Kauper, "Utilization of State Commissioners in the Administration of the Federal Motor Carrier Act," 34 *Michigan Law Rev.* 37 (Nov., 1935).

<sup>13</sup> Edward S. Corwin, "National-State Cooperation—Its Present Possibilities," 46 *Yale Law Jl.* 599, 601 ff. (Feb., 1937).



## CHAPTER II

### THE THEORY OF EXCLUSIVENESS OF THE COMMERCE POWER

THE doctrine which has come to be recognized by the Supreme Court in cases involving the commerce clause is that this grant of power confers upon Congress an exclusive regulative authority. The Court admits on occasion that the states, acting under their reserved powers, may enact valid regulations which incidentally affect interstate and foreign commerce or directly regulate it in its strictly local aspects. But the basic principle applied is that the function of regulating commerce rests with Congress alone. Acting upon this assumption, the Court has proceeded in numerous instances to strike down state statutes on the ground that they impose a burden upon interstate or foreign commerce or that they invade the sphere of authority reserved exclusively to Congress by the Constitution.

This constitutional theory of the relationship of state and federal authority in the regulation of commerce has been primarily a product of judicial elaboration. Its restatement and refinement from time to time, as new cases are presented for decision, is a continual process. The fundamental doctrines by which the Court professes to be guided are now relatively old and firmly grounded. Their establishment was achieved only with extreme difficulty, and the final result represented a compromise between opposing theories. A basis of adjustment that would enable a proper balance to be maintained between local and national interests had to be evolved. In an atmosphere charged with bitter controversy over the issue of states' rights versus nationalism the Court was unable to arrive at a consistent theory regarding state authority under the commerce clause. Only after the Civil War had settled the fundamental question of the nature of the Union was the Court able to formulate an acceptable theory on this point.

The phraseology of the Constitution permitted a wide latitude of thought and opinion on the question. A generally recognized

## EXCLUSIVENESS OF THE COMMERCE POWER 9

need for concentration of authority over commercial affairs in the national government had been primarily responsible for the assembling of the convention which drafted the Constitution. Notwithstanding this fact, the fundamental law as it came from the hands of the founders was vague on the point of the degree to which the states had been deprived of power in this field. It must have been generally recognized in 1787 that the conveyance of the commerce power to Congress would seriously impair state authority. Nevertheless, in the convention debates and in contemporary discussions of the new plan of government there was a notable lack of consideration of the implications of this grant of power. Certain implications were seen, and provisions were adopted, or at any rate proposed, to deal with them. But the potentialities of the commerce clause as a bar to future state action were generally left unexamined. What Congress might do under this grant of power, not what the states might not do as a result of it, was the question which gave the framers concern.

### 1. THE CONSTITUTION AND THE THEORY OF EXCLUSIVENESS

THE constitutional phraseology upon which the Supreme Court has founded its theory of the exclusiveness of the commerce power consists of three elements: (1) the commerce clause,<sup>1</sup> (2) a series of provisions restricting Congress in the exercise of the commerce power;<sup>2</sup> and (3) a series of clauses setting up qualified restraints on the states in the exercise of powers having a relation to commerce.<sup>3</sup> Of some significance also was the "supremacy clause" of

<sup>1</sup> Article I, sec. 8, cl. 3: "The Congress shall have power ... To regulate commerce with foreign nations and among the several States, and with the Indian tribes."

<sup>2</sup> Article I, sec. 9, cl. 1: "The migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person."

Article I, sec. 9, cl. 5: "No tax or duty shall be laid on articles exported from any State."

Article I, sec. 9, cl. 6: "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another."

<sup>3</sup> Article I, sec. 10, cl. 2: "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely

Article VI, which requires that state laws and constitutional provisions in conflict with the federal Constitution, national laws, or treaties be held void by the courts; and also the Tenth Amendment, which reserves to the states all powers not delegated to the United States by the Constitution nor forbidden by it to the states.

So far as the commerce clause was concerned, there was nothing in the history of its adoption in the Convention that gave any clear indication that the framers regarded it as conferring an exclusive power on Congress.<sup>4</sup> In the delegation of this authority to Congress the framers had prominently in mind the regulation of shipping by the passage of a navigation act favorable to the development of an American merchant marine and the strengthening of the national government's hand to enable it to carry out national obligations under commercial treaties. In vesting control over interstate commerce in Congress the principal objective was the prevention of trade restraints, which, if permitted to continue, would disrupt the nation's internal commerce and lead to disunion.<sup>5</sup> It was not made clear, however, whether positive action

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necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress."

Article I, sec. 10, cl. 3: "No State shall, without the consent of Congress, lay any duty of tonnage, . . . enter into any agreement or compact with another State or with a foreign power, or engage in war . . ."

<sup>4</sup> Justice Joseph Story, in his *Commentaries on the Constitution of the United States* (1st ed., 1833), Vol. II, sec. 1063, note 5, observed that late in the proceedings it was moved in the Convention to amend the commerce clause to give Congress the "sole and exclusive" authority in this field, but that the proposition was rejected by a vote of six states to five. The same point is made by Ezra P. Prentice and John G. Egan, *The Commerce Clause of the Federal Constitution* (1898), p. 11, on the authority of Story's statement. Examination of the source indicated shows, however, that the motion to amend by inclusion of the words "sole and exclusive" had reference to the clause concerning treason, not the commerce clause. See Jonathan Elliot, *Debates on the Adoption of the Federal Constitution* (2d ed., 1866; hereafter cited as Elliot's *Debates*), I, 252; James Madison, *Journal of the Debates of the Congress of the Confederation* (Vol. V of Elliot's *Debates*, 2d ed.; hereafter cited as Madison's *Journal*), pp. 449-450. In spite of the inference in favor of the concurrent-powers construction of the commerce clause which such action, had it occurred, would have justified, Justice Story remained a strong advocate of the exclusive-power theory.

<sup>5</sup> Madison wrote in No. 42 of the *Federalist* (H. C. Lodge ed., 1900), pp. 262-263:

"The defect of power in the existing Confederacy to regulate the commerce between its several members, is in the number of those which have been clearly pointed out by experience . . . . A very material object of this power was the

by Congress would be necessary to control state laws detrimental to national interests.

The only expression of views of members of the Convention bearing on this question occurred late in the deliberations, after agreement had already been reached on the inclusion of the commerce clause in the completed plan.<sup>6</sup> The occasion was the consideration of clauses, eventually adopted, establishing conditional restraints upon the states in the levying of tonnage duties and taxes upon imports and exports and prohibiting Congress from levying taxes upon exports. In the history of the adoption of these clauses are found the most significant expressions of opinion by members of the Convention on the point whether, in the absence of positive action by Congress, the grant of the commerce power to Congress might provide a basis for denial of the same power to the states.

The tentative draft of the proposed Constitution which came from the hands of the Committee on Detail included a clause prohibiting the levy of an export tax by Congress.<sup>7</sup> This clause was the subject of considerable discussion, and an attempt was made by Madison to have it eliminated. In the course of the discussion Madison and Gouverneur Morris insisted that the real danger in taxation of exports lay in permitting the states to have this power, not Congress. Its exercise by the states, they argued, would permit recurrence of the interstate conflicts and trade rivalries which it was desired to prevent. In reply on this point it was suggested

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relief of the States which import and export through other States, from the improper contributions levied on them by the latter . . . .

"The necessity of a superintending authority over the reciprocal trade of confederated States, has been illustrated by other examples as well as our own"

See also the letter of Madison to Cabell of Feb. 13, 1829, in Max Farrand, *The Records of the Federal Convention of 1787* (1911), III, 478. For an excellent analysis of contemporary views concerning the purpose and meaning of the commerce clause see Albert S. Abel, "The Commerce Clause in the Constitutional Convention and in Contemporary Comment," 25 *Minnesota Law Rev* 432 (March, 1941).

<sup>6</sup> The tentative draft drawn up by a Committee of Detail of five members included a clause granting to Congress power "to regulate commerce with foreign nations, and among the several states." This clause was approved unanimously and without debate by the Convention, after an adjustment of differences on the matter of the limitations on the exercise of the commerce and taxing powers had been made. The addition of the phrase having reference to commerce with the Indian tribes was made upon the initiative of Madison near the close of the proceedings. See Madison's *Journal*, pp. 378-379, 433-434, 489-492, 552-553.

<sup>7</sup> Article VII, sec. 4, of the Committee Draft; Madison's *Journal*, p. 379.

by other members that Congress under its power to regulate commerce between the states could exercise a controlling authority so as to prevent any abuses of power by the states.<sup>8</sup> There was no expression of opinion from any quarter that the *grant of the commerce power to Congress*, which had already been agreed to, would operate automatically as a bar to such state interference with commerce. The differences of opinion concerned the questions whether Congress should be trusted with power to levy such taxes and whether the commerce power *could be used* effectively to prevent state abuse of power in this regard.

Having failed in his effort to remove the restriction upon Congress with respect to the taxation of exports, Madison turned his attention to securing the adoption of a similar limitation upon the states. This he attempted by bringing up for consideration a clause in the draft plan<sup>9</sup> by which the states were to be prevented from levying duties on imports without the consent of Congress. His motion to include the phrase "to lay embargoes" in the conditional prohibition was lost, as was another by him to make absolute, instead of conditional, the restriction upon the states in reference to import duties.<sup>10</sup> The clause in question was then amended by the addition of the term "exports," to make taxation of both imports and exports by the states subject to Congressional consent. It was also provided that the returns from such levies be diverted to the national treasury.<sup>11</sup> The discussion of these motions in no instance brought forth the suggestion that the *grant of power* to Congress to regulate commerce might bar the exercise of such powers by the states. The adoption of this clause indicated that the members of the Convention understood that the states might levy such taxes in the absence of a specific constitutional prohibition. There was no indication of a view that the vesting of the commerce power in Congress, per se, would operate as a restriction upon state authority in any degree.

<sup>8</sup> Madison's *Journal*, pp. 433-444, 454-456. Sherman, Langdon, Ellsworth, G. Morris, and Madison participated in the discussion. All indicated in their statements that they regarded the power to tax exports as still residing in the states under the terms of the Constitution as then formulated.

<sup>9</sup> Article XIII of the Committee Draft; Madison's *Journal*, p. 381.

<sup>10</sup> Madison's *Journal*, p. 486.

<sup>11</sup> *Ibid.*, p. 487. Later the clause was amended further by the incorporation of phrases which would make it unnecessary for the states to seek Congressional consent for the levy of import and export taxes to pay the costs of inspection. It thus took the form it now has in Article I, sec. 10, cl. 2, of the Constitution.

## EXCLUSIVENESS OF THE COMMERCE POWER 13

The clause reserving to states a provisional power of taxation through tonnage duties originated only two days before the close of the Convention's activities. When perfecting amendments were being considered, two of the Maryland delegates, McHenry and Carroll, offered a motion to add a clause providing that "no state shall be restrained from laying duties on tonnage for the purpose of clearing harbors and erecting lighthouses."<sup>12</sup> Their motion was apparently to make clear that states might levy such duties for the maintenance of aids to navigation. It was deemed expedient to assess the cost of such improvements upon the shipping benefited, but it was not generally agreed that the national government would or could authorize expenditures for this purpose. The motion found support and was eventually adopted in a modified form. The provision appeared in the completed draft as a reservation of power to the states to levy tonnage duties with the consent of Congress.<sup>13</sup>

The debate on the tonnage-tax provision disclosed a variety of viewpoints, both as to the power of the states to levy such duties in the absence of the authorization and as to the possible implication that would be attached to the clause. Gouverneur Morris expressed the opinion that to include the clause would do more harm than good so far as protecting the states in their powers was concerned. His point was that the states were not restrained from laying tonnage taxes for any purpose as the Constitution stood, and the authorization for the purposes specified would imply the contrary.<sup>14</sup> Apparently holding a similar view on the point of state power, Sherman, of Connecticut, pointed out that since the power of the national government was "supreme," it could control

<sup>12</sup> Madison's *Journal*, p. 548. For the origin of the idea see excerpts from McHenry's *Notes*, in Farrand, *op cit*, II, 504, 529, 633-634.

<sup>13</sup> Article I, sec. 10, cl. 3. Included in the same category of conditional powers was the power of forming compacts with other states and with foreign nations. This provision grew out of a clause in the Pinckney Plan imposing an absolute prohibition on such agreements by the states. The provision of the Pinckney Plan was carried over into the tentative draft reported by the Committee on Detail; but the absolute prohibition was made conditional on consideration of this feature of the draft plan by the Convention. There was no opposition to this action, and the implications of the compact clause in reference to commercial matters were not discussed. See Madison's *Journal*, pp. 131, 381, 548; also Abraham C. Wienfeld, "What Did the Framers of the Federal Constitution Mean by 'Agreements or Compacts?'" 3 *University of Chicago Law Rev.* 453 (April, 1936).

<sup>14</sup> Madison's *Journal*, p. 548.

interferences by the states without a special provision of this nature.<sup>15</sup>

On the other hand, Langdon, of New Hampshire, and Madison offered opinions which seemed to indicate that they did not consider it wise to rely solely upon the superior power of the federal government to afford protection against state interferences of this character. Madison stated that whether states were able to levy tonnage duties depended upon the extent of the power granted to Congress to regulate commerce. Although the terms were "vague," in his opinion, he believed the grant of the commerce power to Congress excluded that of the states to levy such taxes. He declared that he was "more and more convinced that the regulation of commerce was in its nature indivisible, and ought to be under one authority."<sup>16</sup> Observing that there might be objects for the laying of tonnage duties other than those specified, he favored changes in the provision to remove the limitation on the purposes of such levies by the states and to make the exercise of the power subject to Congressional assent. The clause was adopted in the form he advocated.<sup>17</sup>

From these expressions of opinion it would appear that in the minds of some members, at least, the idea was developing that the *grant* of the commerce power involved a limitation on the exercise of powers by the states. The idea was not elaborated upon, possibly because those who entertained it did not wish to raise a point which might give additional reason for opposition to the new plan of government.<sup>18</sup> The conclusion seems warranted that it was generally held by members of the Convention that the *grant* of the commerce power to Congress did not in itself deprive the states of authority to legislate on matters relating to commerce, but that *positive action* by Congress under the grant was necessary to control such state legislation. The inclusion of clauses authorizing

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> This is suggested by Madison's statement in the Cabell letter of Feb. 13, 1829, wherein he wrote: "I always foresaw that difficulties might be started in relation to that power [the commerce power] which could not be fully explained without recurring to views of it, which, however just, might give birth to specious, though unsound objections." Farrand, *op. cit.*, III, 478. Abel, *op. cit.*, p. 481, observes: "Had the issue [of the effect of the commerce clause on state powers] been clearly posed and unequivocally settled, it might perhaps have eliminated decades of judicial groping and guessing; and on the other hand it might have broken up the convention."

state exercise of taxing powers in relation to interstate and foreign commerce only with the specific permission of Congress tends to substantiate this conclusion. However, these provisions could also have been regarded as exceptions to the general rule that all taxing and regulatory power in relation to commerce was meant to be vested in Congress.

The scant attention in the Philadelphia Convention to the question of the bearing of the commerce clause upon the reserved powers of the states had its parallel in the discussions of the Constitution in the *Federalist* essays and in the state ratifying conventions. Only brief consideration was given by the writers of the *Federalist* to the defense of the proposal to grant to Congress the commerce power.<sup>19</sup> The compromise provision relative to the slave trade, the elimination of the two-thirds-vote requirement for the passage of navigation acts, and the limitations on state powers in respect to taxation of imports and exports were criticized freely and had to be defended. Fears were expressed in many of the state conventions that Congress might use its commerce power to establish oppressive "monopolies." These objections resulted in a number of resolutions proposing amendments on some of these points in state conventions.<sup>20</sup> But on the large question of the restrictive effect of the grant of the commerce power upon the exercise of powers by the states, little was said. In drawing the line between the generally acknowledged reserved powers of the states and the power of Congress to regulate commerce the special provisions of the Constitution relative to state taxes were apparently deemed sufficiently clear and comprehensive.

The failure of the framers to indicate their own understanding of this question and to mark more definitely the limits of state authority in this field forced upon the legislative bodies of the state and nation, and eventually upon the courts, the responsi-

<sup>19</sup> Madison wrote in No. 45 of the *Federalist*, p. 291: "The regulation of commerce, it is true, is a new power, but this seems to be an addition which few oppose and from which no apprehensions are entertained"

<sup>20</sup> Amendments forbidding the establishment of monopolies by Congress were proposed by the Massachusetts Convention, Elliot's *Debates*, I, 323; by New Hampshire, *ibid.*, p. 326; by New York, *ibid.*, p. 330; and by Rhode Island, *ibid.*, p. 337. After the adoption of the Constitution the states continued to exercise power to set up monopolies in transportation, even where interstate commerce was affected.



bility for determining them. The fundamental issue was whether the commerce clause conferred a power upon Congress which was exclusive by its nature. Although the evidence drawn from the Constitution itself and the debates thereon is not conclusive, it tends to show that this grant of power was not generally regarded as taking the subject completely out of the hands of the states.<sup>21</sup> The common assumption seems to have been that the special clauses limited the states where limitations were most required and that the superior authority of Congress could be used to prevent other undesirable state interferences with commerce. In the course of events, however, the duty devolved upon the Supreme Court to protect the national interests against state legislation of this nature. The Court met this responsibility by developing the theory of exclusiveness of the commerce power. Under this doctrine the grant of power to Congress was held to operate automatically to bar regulation by the states except in a limited sphere.

Whether the Supreme Court has interpreted the Constitution in this particular in accordance with the intent and understanding of the framers is a matter of speculation, profitless in the sense that the problems with which the Court has been forced to deal were in most cases unforeseen by the framers, and hence unprovided for by them. Even if the intent and understanding of the founding fathers were clearly discoverable, it is unlikely that the course of constitutional development in this particular would have been materially different. Whatever the purpose of the framers, it does not follow that they succeeded in achieving it, necessarily, in their phrasing of the fundamental law. In interpreting the Constitution the Court gives weight to the known intent of the framers and to evidences of contemporary understanding of its terms; but it places primary emphasis upon the words of the document as a basis for constitutional construction.<sup>22</sup> This rule was adopted quite early by the Court and has been affirmed in direct reference to the construction of the commerce clause.<sup>23</sup> The current constitutional

<sup>21</sup> Abel, *op. cit.*, pp. 493-494, expresses the opinion that the weight of evidence tends to support the view that the grant of the commerce power to Congress was regarded by the framers as a withdrawal of authority from the states only within the extremely limited field then deemed to be covered by the commerce clause.

<sup>22</sup> W. W. Willoughby, *The Constitutional Law of the United States* (2d ed., 1929), I, sec. 32, p. 54; Thomas L. Cooley, *Constitutional Limitations* (8th ed., 1927), I, 142-143.

<sup>23</sup> In *Sturges v. Crowninshield*, 4 Wheat. 122, 202-203 (U. S.) (1819), Chief

theory regarding the respective spheres of authority of the states and Congress in regulating interstate and foreign commerce has evolved primarily from the phraseology of the document as interpreted by the courts in the light of contemporary problems. If the purpose and understanding of the framers was to vest in Congress a paramount rather than an exclusive power in this field, that purpose has been only partly realized. In sustaining the various types of coöperative federal acts described in this study the Supreme Court has given practical reality in some degree to the conception that Congress enjoys a paramount regulative power over interstate and foreign commerce, a power which it shares with the states and may exercise, if it prefers, in conjunction with them.

## 2. THE COURTS AND THE THEORY OF EXCLUSIVENESS

THE first pronouncement by the Supreme Court on the subject of the commerce clause came thirty-five years after the Constitution was adopted. Within that time there had been important developments in the commercial interests of the nation. The improvement of roads and internal waterways, the adaptation of steam to the uses of water navigation, the stimulation of American shipping and manufacturing as a result of the Napoleonic Wars, and the commercial policies of the federal government had all contributed to bring about an expansion of trade to which freedom from the exactions of local authorities was of even greater concern than it had been in 1789. When the Supreme Court was first called upon to interpret the phraseology of the Constitution on

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Justice Marshall stated the rule in the following words: "Although the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. It would be dangerous in the extreme to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide shall be exempted from its operation. . . . If, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application." To the same effect was the language he used in *Dartmouth College v. Woodward*, 4 Wheat. 518, 644-645 (U. S.) (1819). Justice Peckham, in *Addystone Pipe and Steel Co. v. United States*, 175 U. S. 211, 228 (1899), declared: "The reasons which may have caused the framers to vest the power to regulate interstate commerce in Congress do not, however, affect or limit the extent of the power itself."

commerce and its regulation, it had pressed upon its attention not only an immediate issue of the legality of a state interference with the freedom of steam navigation, but the future of a rapidly growing national commerce which demanded a minimum of state interference as a condition of its further development.

Since Congress had shown a disposition to leave commerce, particularly that of an interstate character, largely free from national control, the attention of the Court in the first century of constitutional development was directed toward defining the limits of state, rather than national, power over the subject. This involved immediately an examination of the question whether the grant of power to Congress placed interstate and foreign commerce wholly beyond the reach of state action. It was not a question easily and quickly disposed of. The case of *Gibbons v. Ogden* in 1824 ushered in a long period of controversy during which the nation's highest court found itself so divided on this fundamental point that no final and authoritative conclusion could be stated. The bearing of the slavery issue on the question was a most disturbing factor.<sup>24</sup> The triumph of the exclusive-power theory was not complete until after this disturbing influence had been eliminated by the Civil War.

Inferences drawn from the legislative practices of Congress in early years tended to give support to the conclusion that the power to regulate commerce, at least in some phases, still resided in the states. Indeed, a claim to an immediately exclusive control by Congress over all aspects of regulation of foreign and interstate commerce would have been impractical. State regulation of matters involved more or less directly in carrying on commerce, such as aids to navigation, quarantines, master-and-servant relations on vessels, and negotiable instruments, had in most instances been

<sup>24</sup> Charles Warren, in *The Supreme Court in United States History* (1922), II, 87-88, observes on this point: "Throughout the long years when the question of the extent of the Federal power over commerce was being tested in numerous cases in the Court, that question [the slave trade] was, in the minds of Southerners, simply coincident with the question of the extent of the Federal power over slavery. So the long-continued controversy as to whether Congress had exclusive or concurrent jurisdiction over commerce was not a conflict over theories of government, or between Nationalism and States-Rights, or between differing legal constructions of the Constitution, but was simply the naked issue of State or Federal control of slavery. It was little wonder, therefore, that the Judges of the Court prior to the Civil War displayed great hesitation in deciding this momentous controversy."

continued as a matter of course without federal sanction. A move in the direction of the creation of a generalized common law was eventually made by the national courts in the adjudication of cases involving interstate commercial transactions, but this was late in developing, and the system remained imperfect.<sup>25</sup> All but a small part of the activities of persons engaged in interstate and foreign commerce would have been left outside the purview of any statutory law had there not been recognition given to state statutes applying to them. To have demanded that Congress legislate fully and exclusively upon these and all similar matters in the beginning would have imposed an impossible task upon it. Naturally, then, the attitude expressed in Congressional policy in early sessions, in which a number of figures prominent in the formation and adoption of the Constitution participated, tended to be that of regarding federal power over commerce as superior to, but not necessarily exclusive of, that of the states. Nevertheless, individual members of Congress upon occasion expressed strongly their conviction that the power to regulate foreign and interstate commerce must, by its very nature, be regarded as resting exclusively in the national government.<sup>26</sup>

The measures adopted by state legislatures during this early period were indicative of a general opinion that the states retained the authority to legislate on matters directly affecting foreign and interstate commerce; but these acts did not signify necessarily that a complete and general concurrent power over commercial regu-

<sup>25</sup> A "universal" commercial law, common to all states and binding upon them in reference to commercial instruments, was applied by the Supreme Court for the first time in *Swift v. Tyson*, 16 Pet. 1, 19 (U. S.) (1842), the opinion being rendered by Justice Story. The doctrine of this case was recently repudiated by the Court in *Erie R. R. v. Tompkins*, 304 U. S. 64 (1938). For comment on this general question see J. S. Waterman, "The Nationalism of *Swift v. Tyson*," 11 *North Carolina Law Rev.* 125 (Feb., 1933); J. A. C. Grant, "The Search for Uniformity of Law," 32 *American Political Science Rev.* 1082 (Dec., 1938).

<sup>26</sup> In a discussion of an internal-improvements bill in 1817 Representative Sheffey, of Virginia, declared: "The regulations of commerce with foreign nations, and with the Indian tribes, have been universally considered as exclusive powers vested in the General Government. No State has pretended to interfere with either. To regulate commerce between the several States, in its nature must be exclusive. The conflicting legislation of the States would destroy the uniformity which this clause was intended to establish. Besides, two or more States could not regulate commerce between them, but by compact, which they are expressly forbidden to do without the consent of Congress." *Annals of Congress*, 14th Cong., 2d Sess., p. 888. His statement was not challenged.

lation was claimed. They appear to have been regarded for the most part as arising from the unquestioned right of the states to regulate their own internal commerce and local affairs of police, even though external commerce was incidentally affected. There was no attempt to apply the principle of a general coordinate concurrent jurisdiction in commercial regulation so as to place state laws on a plane of equality with national regulations, as in the case of tax measures. If these acts touched upon matters falling within the range of federal power, they were apparently considered valid in the absence of Congressional acts to the contrary.

Numerous companies were chartered by the states for the construction of roads, bridges, piers, ferries, and navigation improvements. These companies were as a rule authorized to levy tolls upon traffic benefiting from the use of the improved transportation facilities and were given monopoly privileges.<sup>27</sup> In some instances, if such companies were to be reimbursed through a fee based upon tonnage, the consent of Congress was obtained; but in others this was not sought.<sup>28</sup> Numerous laws authorizing the establishment of ferries and bridges with exclusive privileges and toll-levying rights were passed during these early decades. Congressional consent was not sought, even when the traffic was wholly interstate in character.<sup>29</sup> Stage lines were set up with exclusive privileges to operate between points within a state and outside cities, and were protected in their monopolies by state courts.<sup>30</sup>

The most serious invasions of the field of commercial regulation

<sup>27</sup> For an account of these early state transportation monopolies see Ezra P. Prentice, "State Monopolies of Inter-State Transportation," 178 *North American Rev.* 499 (April, 1904), and "Chief Justice Marshall on Federal Regulation of Interstate Carriers," 5 *Columbia Law Rev.* 77 (Feb., 1905).

<sup>28</sup> The power of a state to authorize, without express Congressional consent, the collection of tolls on shipping measured by the draft of vessels, for the purpose of maintaining navigation improvements, was upheld by the Supreme Court of Connecticut in *Kellogg v. The Union Company*, 12 Conn. 7 (1837), and *Thames Bank v. Lovell*, 18 Conn. 500 (1847). Such acts were recognized as valid in the absence of Congressional consent in *Huse v. Glover*, 119 U. S. 543 (1886).

<sup>29</sup> See the articles cited *supra*, note 27, for instances of this type of legislation.

<sup>30</sup> In *Perrin v. Sykes*, 1 Day 19 (Conn., S. Ct.) (1802), the Supreme Court of Connecticut upheld the assessment of a penalty against the violator of a monopoly privilege of interstate character. The stage line in question ran between Westfield, Massachusetts, and Albany, New York. The point of interstate character of the monopolized route was not raised in the case.

The question of the power of the states to establish such monopolies and of the federal government to interfere with them by authorizing carriers of the mails to transport passengers along these monopolized routes was considered at

in this early period were made through state grants of exclusive privileges of navigation in local waters. In theory the right of the states to grant such monopolies rested upon the same basis as the creation of stage-line, bridge, and ferry monopolies. The interference with interstate and foreign commerce which resulted was much more serious, however. The greater part of this commerce was carried by water, and the clash between local and general interests was immediately felt. Lack of power in the national government to control state interferences with interstate commercial intercourse by water had been largely instrumental in bringing about the Convention of 1787. National authority had been exercised in respect to this mode of commercial intercourse immediately after the adoption of the Constitution.<sup>31</sup>

Legislation of this type by the states was designed generally to give encouragement to the development of steam navigation, although in a few cases the object was to secure the improvement of navigation facilities. Beginning with legislation in 1787 granting to John Fitch an eighteen-year monopoly on navigation in state waters with boats propelled by steam, New York took a leading rôle in encouraging the development of this new mode of water transportation. The monopoly thus created was placed in other hands and extended by later acts in 1798, 1799, 1803, and 1807.<sup>32</sup> A year after the successful experiment of Fulton and Livingston in

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an early date in Congress. In 1791 a proposal to authorize federal mail carriers to carry passengers along such routes was defeated by a vote of 33 to 25 in the House, after considerable discussion. Though this action did not indicate definitely a view that Congress lacked power to prevent or to interfere with such transportation monopolies, since there were other factors involved, it did show that a majority in the House did not consider such legislation by the states unconstitutional. Statements made in this debate by Elbridge Gerry, of Massachusetts, a member of the Philadelphia Convention, revealed, however, that there was then some support in Congress of the idea that state interference in this manner with the freedom of intercourse between the states was forbidden by the terms of the Constitution. *Annals of Congress*, 2d Cong., pp. 303-311.

<sup>31</sup> The first act by Congress affecting commerce was one levying import duties on certain commodities, passed July 4, 1789, 1 *Stat.* 24, the second was the tonnage-duty act of July 20, 1789, 1 *Stat.* 27, the third, passed on July 31, 1780, 1 *Stat.* 29, laid out revenue districts and designated ports of entry for the enforcement of these revenue measures. Navigation acts providing for the enrollment and licensing of vessels were passed on Sept. 1, 1789, 1 *Stat.* 55; Sept. 16, 1789, 1 *Stat.* 69; Sept. 29, 1789, 1 *Stat.* 94; Jan. 7, 1791, 1 *Stat.* 188; Dec. 31, 1792, 1 *Stat.* 287; and Feb. 18, 1793, 1 *Stat.* 305.

<sup>32</sup> For a history of this state legislation see statement of counsel in *Gibbons v. Ogden*, 9 Wheat, 1, 5-7 (U. S.) (1824).

1807 the legislature of that state extended their monopoly in New York waters for a period of thirty years, and in 1811 enacted legislation specifically directed toward protecting it.<sup>33</sup> Other states were quick to imitate the example of New York in granting valuable monopoly privileges of this sort.<sup>34</sup>

Owing to the situation of the port of New York and to the rapid development of steam navigation after 1807 the monopoly in that state immediately became a matter of concern to shipping interests in other states. As the oppressive effect of the monopoly upon interstate trade began to be felt more keenly, neighboring states passed retaliatory legislation. A recurrence of the conditions of the Confederation period under which interstate trade was harassed by local regulations was threatened.<sup>35</sup> The importance of the interests involved was reflected in the numerous appeals to the New York courts to support the monopoly by injunctive measures. Adopting the view that the commerce power was merely paramount, and not exclusive, and that state legislation affecting

<sup>33</sup> Act of April 11, 1808, *Laws of the State of New York*, 1808, p. 333; Act of April 9, 1811, *Laws of the State of New York*, 1811, p. 368.

<sup>34</sup> Cf. Act of Nov. 10, 1815, *Laws of Vermont*, 1815-1817, p. 120, Act of Feb. 7, 1815, *Laws of the Commonwealth of Massachusetts*, 1812-1815, VI, p. 595; Act of March 26, 1813, *Acts of the General Assembly of the Commonwealth of Pennsylvania*, 1812-1813, p. 181; *Acts of the Territory of Orleans*, 1811, c. 26, p. 112.

<sup>35</sup> An Ohio act of Feb. 1, 1822, penalized the landing, at Lake Erie ports, of passengers from any vessel sailing under license of the New York Monopoly. *Chase's Statutes of Ohio, 1788-1833*, II, c. 543 and 558. Connecticut forbade the use of its waters to vessels sailing under the license of the Monopoly. In 1807 New Jersey first took cognizance of the New York Monopoly by an "act to preserve the jurisdiction of the state." This act made it a penal offense for a New York officer to serve a process on a New Jersey citizen while on waters claimed to be under the latter's jurisdiction. An act of 1811 gave any citizen of the state whose steam vessel was seized under color of the New York monopoly statutes the right to seize any steamboat lying in New Jersey waters and belonging to any citizen of New York; and an act of 1820 gave to any New Jersey citizen against whom an injunction or order proceeded from a New York court under color of authority of the monopoly statutes the right to sue for damages in New Jersey courts for injuries suffered. See *Gibbons v. Livingston*, 6 N. J. Law 236, 279-280 (1822), for a review of this legislation. In this case, in which a New Jersey steamship owner sought to enforce the rights covered by the last-mentioned statute, the New Jersey Supreme Court, with some evident reluctance and disclaiming any intention of judging the validity of the New York monopoly statutes, issued a decree to that end. The court suggested that there were constitutional rights and issues involved over which the federal courts would have a final voice. See also *Gibbons v. Ogden*, 6 N. J. Law 286 (1822), and *Gibbons v. Ogden*, 8 N. J. Law 288 (1826).

interstate and foreign commerce directly should be allowed to stand, so long as it was not in conflict with the express prohibitions on the states in the Constitution or with acts of Congress, the New York courts gave full protection to the monopoly.<sup>36</sup>

When Aaron Ogden, a licensee of Fulton and Livingston, sought an injunction against Gibbons, a New Jersey operator of two steamboats engaged in passenger service between points in that state and New York City, a new issue was injected. The latter set up as a defense that the New York statutes were in conflict with a national law, enacted in 1793, providing for the enrollment and licensing of vessels in the coastal trade. This was a point that had not been specifically dealt with in the previous cases. The Chancellor held that the effect of the federal license for Gibbons' vessels was only to give them an American character, without conferring a privilege overriding that derived from the state grant. The injunction was allowed as prayed, and the decree was unanimously upheld by the Court of Errors and Appeals.<sup>37</sup> A review of this ruling was then sought by appeal to the United States Supreme Court. Thus the question of the interpretation of the commerce clause in its bearing upon state powers was for the first time placed before the highest tribunal in the land, and an opportunity given to that body to begin its work of drawing the line between the states' reserved powers and the authority of Congress under the commerce clause. It is remarkable that this case should have brought forth the statement, in one way or another, of most of the basic theory later to be elaborated in reference to the commerce power. The opinion has rightfully come to be regarded as one of the most significant utterances of Chief Justice Marshall. It became the touchstone of the Court in later exposition of the constitutional theory of the commerce clause.

Speaking broadly, three basic theories have commanded some support from the Supreme Court on the question of the scope of

<sup>36</sup> *Livingston v. Van Ingen*, 9 John. 507 (1812); *Livingston v. Ogden and Gibbons*, 4 John. Chan. R. 48 (1819), *Livingston v. Gibbons*, 4 John. Chan. R. 794 (1819); *In re Vanderbilt*, 4 John. Chan. R. 57 (1819); *Ogden v. Gibbons*, 4 John. Chan. R. 174 (1819), *Livingston v. Tompkins*, 4 John. Chan. R. 415 (1820); *Livingston v. Gibbons*, 4 John. Chan. R. 570 (1820); *Livingston v. Gibbons*, 5 John. Chan. R. 250 (1820); *North River Steamboat Co. v. Hoffman*, 5 John. Chan. R. 300 (1821).

<sup>37</sup> *Ogden v. Gibbons*, 4 John. Chan. R. 150 (1819); *Gibbons v. Ogden*, 17 John. 488 (1820).



state and federal authority over interstate and foreign commerce, viz., the concurrent-powers theory, the exclusive-power theory, and the local-concurrent-powers theory. In addition, the Court has applied what might be termed a fourth, the conditionally-exclusive-power theory. This, however, represented not so much a general theory of the scope of state and federal authority under the commerce clause as a rule of construction to be followed in the settlement of conflicts between state and federal acts involving commerce. It called for a broad interpretation of such federal acts to exclude the operation of state laws dealing with the same subject. It was not necessarily incompatible with the other three theories, but could be associated with any of them. The first three represented distinct points of view on the basic question. As the analysis which follows shows, sharp disagreement in regard to them prevailed in the Supreme Court over a period of nearly half a century.

#### A. THE CONDITIONALLY-EXCLUSIVE-POWER THEORY

Three arguments against the validity of the New York monopoly laws were stressed by Daniel Webster and Attorney General Wirt in the presentation of the case of the plaintiff in error before the Court. Wirt placed greatest emphasis upon the point that the state statutes were in conflict with the grant of power to Congress to provide regulations for the issuance of patents.<sup>38</sup> Webster chose to base his argument mainly on two points: (1) that the state legislation constituted a regulation of commerce in conflict with the constitutional grant of exclusive power to Congress in this field; and (2) that the state acts violated rights and privileges derived from the federal license held by his client under the terms of a federal law of 1793 providing for the enrollment and licensing of vessels in the interstate coasting trade.<sup>39</sup>

The point which proved controlling, as set forth in the opinion given by Chief Justice Marshall, was that the navigation monopoly laws of New York, as applied to the case at hand, were in conflict with the coastal shipping enrollment and licensing act.<sup>40</sup> The

<sup>38</sup> *Gibbons v. Ogden*, 9 Wheat. 1, 166 (U. S.) (1824). The Attorney General also made the points which Webster emphasized, but gave primary attention to the patent-power issue. It was not considered in the opinion of the Court.

<sup>39</sup> *Ibid.*, pp. 9, 27. The statute involved was the Act of Feb. 18, 1793, 1 Stat. 305.

<sup>40</sup> *Gibbons v. Ogden*, 9 Wheat. 1, 221 (U. S.) (1824).

Court found that Congress had constitutional power to adopt such a regulation; that the coasting-trade license conferred upon the licensee, Gibbons, the privilege of navigating his vessels in the interstate trade upon the coastal waters of the United States, whether within the state's jurisdiction or not; that the interstate transportation of passengers, by either steam or sailing vessels, was "commerce" within the meaning of the Constitution and the act; and that the New York legislation establishing the monopoly constituted an illegal restraint upon the exercise of the privilege conferred by national law, under the rule of supremacy of federal law over state law. The position of the Court was that "occupation of the field" by the federal government operated to defeat the force of the state monopoly laws so far as interstate shipping was concerned.<sup>41</sup>

The Court thus chose to stand upon the relatively easily defensible proposition that the state laws came into conflict with a superior federal enactment. There could be no quarrel with its holding that state law must give way in the face of a conflict with a valid federal act on the same subject. This principle was clearly established by the Constitution. There was a possibility of disagreement with the Court's views on the construction of the federal licensing act,<sup>42</sup> but the constitutional principle applied could not be questioned.

The view of the commerce clause which was set forth in this part of the opinion avoided a direct answer to the question whether

<sup>41</sup> The New York courts gave a broad interpretation to the ruling and held it to have the effect of invalidating the monopoly in purely intrastate navigation as well as in navigation involving more than one state. See *North River Steamship Co. v. Livingston*, 3 Cowen 713 (N. Y.) (1825). In view of the fact that in *Veazie v. Moor*, 14 How 568 (U. S.) (1852), the Supreme Court upheld the right of a state to establish a navigation monopoly of a purely intrastate character, it appears that the state court in *North River Steamship Co. v. Livingston* ascribed a wider effect than was necessary to the ruling in *Gibbons v. Ogden*.

<sup>42</sup> Marshall's logic failed to convince Chancellor Kent that the construction given the coastal license act by the New York Court of Errors prior to the Supreme Court ruling had not been correct. Having been retired from the New York bench, Kent had no opportunity to express judicially his views on the matter; but in his *Commentaries on American Law* (1st ed., 1826), I, Lect XIX, pp. 409-412, the Chancellor criticized the reasoning of the Court on this point. He not only refused to approve the Supreme Court's views on the construction of the licensing act, but failed to attach any significance to the *dicta* in the opinion on the exclusiveness of the commerce power. In later editions the criticism regarding the construction of the act was revised and eventually eliminated.

the entire range of power covered by it was exclusive or not. The Court held that since Congress, by positive act, had brought a particular subject under its regulatory authority, it must be assumed that it intended its regulations, so far as that particular subject was concerned, to be exclusive. The federal legislation by implication denied to states the power to amplify or to abridge the privileges conferred under it. The rule applied was nothing more than that the negative implications of federal regulatory legislation should be given broad effect.<sup>43</sup> The exclusion of state power was made to turn upon the will of Congress, not upon the grant to Congress of an exclusive power over the subject.

The Supreme Court has since applied this conditionally-exclusive-power principle in numerous instances in which the validity of state legislation operating upon the subjects of interstate and foreign commerce has been questioned under the terms of federal laws and treaties. During the tenure of Marshall on the Court, and for some time thereafter, it played a leading part in cases of this nature.<sup>44</sup> Until there was a definite agreement on the doctrine

<sup>43</sup> The rule involved was well stated later by Justice Story in *Prigg v. Pennsylvania*, 16 Pet. 539, 617 (U. S.) (1842), though not with particular reference to regulations under the commerce power: "For if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislatures have a right to interfere; and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject matter. Its silence as to what it does not do, is as expressive of what its intention is as the direct provisions made by it."

<sup>44</sup> Cases in which Marshall relied more or less heavily upon this principle were *Brown v. Maryland*, 12 Wheat. 419, 449 (U. S.) (1827); *Worcester v. Georgia*, 6 Pet. 515 (U. S.) (1832); and *Willson v. Blackbird Creek Marsh Co.*, 2 Pet. 245 (U. S.) (1829).

In all his opinions involving the validity of state acts under the commerce clause Chief Justice Marshall sought to base his findings primarily upon conflict between the state acts concerned and federal laws, treaties, or specific prohibitions upon the states in the Constitution. While maintaining that the commerce power was exclusive, he never based an opinion squarely upon the proposition that state legislation was void by reason of conflict with a dormant power of Congress over commerce. His hesitancy to espouse the exclusive-power doctrine in outright fashion afforded opportunity later on for advocates of the general concurrent-powers theory to raise the question whether the Court had accepted the exclusive-power doctrine as controlling. See comments of Thompson, J., in *New York v. Miln*, 11 Pet. 102, 145 (U. S.) (1837); Taney, Ch. J., in *The License Cases*, 5 How. 504, 578 (U. S.) (1847); Daniel, J., in *The Passen-*

of exclusiveness of the commerce power the application of this rule enabled members of the Court who differed widely on the question of the exclusiveness of the commerce power to find common ground.<sup>45</sup> The conditionally-exclusive-power principle demanded the acceptance of neither of the mainly contended theories of the commerce clause. The later acceptance of the theory of exclusiveness, with qualification, did not require an abandonment of the conditionally-exclusive-power rule. The Court continues to apply it in a broad field of legislation in which overlapping of state and national authority is admitted to be possible.<sup>46</sup>

#### B. THE CONCURRENT-POWERS THEORY

Counsel for the defendant in error in *Gibbons v. Ogden* developed at great length the argument that the New York monopoly laws were valid, even though they amounted to regulations of commerce, since the commerce clause did not confer an exclusive regulatory authority upon Congress.<sup>47</sup> Much emphasis was placed upon the earlier case of *Livingston v. Van Ingen*,<sup>48</sup> in which Chancellor Kent had elaborated the concurrent-powers theory of the commerce clause. In later expositions of the doctrine by individual members of the Supreme Court who espoused it, and by counsel in this case, little of importance was added to the defense of it made by Chancellor Kent in that case.

The reasoning in support of this theory began with the assumption that the states as original, sovereign authorities possessed full power in respect to commercial regulation. With the delegation to Congress of authority to regulate commerce this power was not surrendered by the states. A paramount, not an exclusive, national power in the field of interstate and foreign commercial regulation

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*ger Cases*, 7 How. 283, 497 (U. S.) (1849); see also the remarks of Chancellor Kent cited *supra*, p. 25, note 42

<sup>45</sup> This is best illustrated in *The Passenger Cases*, 7 How. 283 (U. S.) (1849).

<sup>46</sup> The illustrative cases are quite numerous. Recent ones include *Gilvary v. Cuyahoga Valley Ry. Co.*, 292 U. S. 57, 60 (1934); *Missouri Pacific R. R. Co. v. Porter*, 273 U. S. 341, 346 (1927); *Napier v. Atlantic Coast Line R. R. Co.*, 272 U. S. 605, 612 (1926); *Pennsylvania R. R. Co. v. Public Service Commission*, 250 U. S. 566, 569 (1919); *Adams Express Co. v. Croninger*, 226 U. S. 491, 505 (1913); *New York Central and Hudson River R. R. Co. v. Board of Chosen Freeholders*, 227 U. S. 248, 264 (1913); *Northern Pacific Ry. Co. v. Washington*, 222 U. S. 370, 378 (1912).

<sup>47</sup> 9 Wheat. 1, 35, 79 ff. (U. S.) (1824).

<sup>48</sup> 9 John. 507 (N. Y.) (1812).

was established. Strictly internal commerce of the states remained under exclusive state control. State regulations affecting external commerce directly might continue to be enacted, provided there was no conflict with federal regulations on the same subject or violation of any of the express prohibitions on the states in the Constitution.<sup>49</sup>

This doctrine found support both in implications drawn from the terms of the Constitution and in the practice of Congress and the states subsequent to 1789. In Kent's opinion, and in later ones by members of the Supreme Court upholding this viewpoint, great emphasis was placed upon the absence of any specific prohibition in the Constitution upon state exercise of powers in relation to commerce<sup>50</sup> or of any other statement indicating that the power to regulate commerce should be regarded as belonging to the national government exclusively.<sup>51</sup> Considering the fact that express

<sup>49</sup> The term "concurrent power," it should be noted, has a variety of meanings. It may be used to describe a "coordinate" power such as that of taxation, which the states may exercise independently of a federal exercise of a similar authority, even though the same subject is affected. Again, it may denote a power in the states to amplify the regulations of the national government in respect to a given subject, without rendering such regulations ineffective. In this sense the concurrent-powers concept stands in contrast to the conditionally-exclusive-power concept. In still another sense, it has reference to a common authority in the national and state governments to regulate a given subject, with the national authority superior to that of the state and exclusive of state authority only when exercised in respect to a given matter. For the most part advocates of a concurrent-powers construction of the commerce clause used the expression in the last meaning. For a discussion of the concept of concurrent power see J. A. C. Grant, "The Scope and Nature of Concurrent Power," 34 *Columbia Law Rev.* 995 (June, 1934).

<sup>50</sup> Chief Justice Taney in *The License Cases*, 5 How. 504, 579 (U. S.) (1847), declared: "And if it was intended to forbid the States from making any regulations of commerce, it is difficult to account for the omission to prohibit it, when that prohibition has been so carefully and distinctly inserted in relation to other powers, where the action of the State over the same subject was intended to be entirely excluded. But if, as I think, the framers of the Constitution (knowing that a multitude of minor regulations must be necessary, which Congress amid its great concerns could never find time to consider and provide) intended merely to make the power of the federal government supreme on this subject over that of the States, then the omission of any prohibition is accounted for, and is consistent with the whole instrument."

<sup>51</sup> The contention has been made that a concurrent power in the states to regulate commerce was implied in the language by which the powers of Congress were defined in Article I, sec. 8, of the Constitution. In the original Pinckney draft the grant of Congressional powers began, "Congress shall have the power, etc."; in the draft reported by the Committee of Detail on August 6

prohibitions upon the states were included in the Constitution in connection with the grant of the currency and treaty-making powers to the national government, both of which had a bearing upon the matter of commercial intercourse in its larger aspects, the omission of a similar prohibition in reference to the regulation of commerce seemed significant. It indicated that no limitation on the states in this regard was intended. The founders of the Constitution were familiar with the rule of interpretation that makes a denial of power in regard to one matter inferential evidence of the acknowledged existence of power in a related matter. A number of the *Federalist* was pointed to in which Hamilton had made declarations tending strongly to support this contention.<sup>52</sup> The language of the Tenth Amendment and the circumstances surrounding its origin were adverted to in further support of this argument. Article I, section 8, clause 17, of the Constitution, which gives Congress "exclusive" power of legislation over the district to be set aside as the seat of government and over places purchased by the United States for the erection of certain public

the definite article was still retained; but in the final draft of the Committee of Style on September 12 the phrase became, "Congress shall have power, etc.," "the" having been omitted. It was suggested by Thomas Addis Emmett in his argument in *Gibbons v. Ogden*, 9 Wheat. 1, 85-86 (U. S.) (1824) that the article was omitted in order to show that not all power so mentioned was to be vested exclusively in Congress unless specifically stated. The Court ascribed no significance to this change in wording.

<sup>52</sup> Seeking to allay the fear that the Constitution would seriously impair the taxing powers of the states, he wrote in No. 32, p. 189: "The necessity of a concurrent jurisdiction in certain cases, results from the division of the sovereign power; and the rule that all authorities, of which the states are not *explicitly divested* in favour of the union, remain with them in full vigor, is not only a theoretical consequence of that division, but is clearly admitted by the whole tenor of the instrument which contains the articles of the proposed constitution. We there find, that notwithstanding the affirmative grants of general authorities, *there has been the most pointed care in those cases where it was deemed improper that the like authorities should reside in the states, to insert negative clauses prohibiting the exercise of them by the states.* The tenth section of the first article consists altogether of such provisions. This circumstance is a clear indication of the sense of the Convention, and furnishes a rule of interpretation out of the body of the act, which justifies the position I have advanced and refutes every hypothesis to the contrary." (Italics mine.)

Referring particularly to the import-duty restriction on state power, he went on to assert that this restriction implied an admission that as regards all other taxes the authority of the state remained undiminished. No mention of the commerce power as a possible bar to state revenue measures was suggested here; but language elsewhere in the same number indicated that he might have had this in mind. See *infra*, p. 35, note 62.

properties, was pointed to as illustrating the method available to the framers in making the commerce power exclusive had that been their purpose.

Still other provisions of the Constitution were called to attention in support of the inference that a concurrent authority over commercial regulation was contemplated. The "supremacy clause" of Article VI, so the argument ran, was included in the Constitution to supply a rule by which cases of conflict between state and federal legislation might be settled. By the terms of the Constitution states were prevented from exercising power in three ways: (1) by absolute denial, (2) by express grant of an exclusive power to Congress, and (3) by requirement of Congressional consent for state action. In all other cases state authority was to yield only to the *exercise* of a superior national authority. If the Constitution did not explicitly provide otherwise, reliance was to be had upon the provisions of federal laws and treaties to inhibit state action detrimental to the general interests.

Still further support for the concurrent-powers doctrine was derived from those provisions of the Constitution which made state exercise of certain powers having a direct relation to commercial regulation contingent upon Congressional consent. The framers, it was argued, recognized that a special problem existed in the field of commercial regulation and that interference by the states with federal policy might result in considerable degree. These provisions were therefore adopted to provide a solution for it. They constituted the complete plan in the Constitution, along with the supremacy clause, for dealing with the problem of state interference with foreign and interstate commercial activities. As has been noted previously, the account of the debates on these clauses in the Convention seems to indicate that this was the general understanding of the framers.

The strength of the concurrent-powers theory lay in its simplicity and in its harmony with the strong states'-rights feeling which was current in the first half of the nineteenth century. It read into the phraseology of the Constitution no meaning beyond that of its terms in their strictest sense. It recognized that, if all the incidents connected with foreign and interstate commercial intercourse were to be subjected to the rule of law, a great variety of legislation was necessary, all of which national law alone could not reasonably be expected to supply. It obviated the drawing of

a fine jurisdictional line between those things which belonged to the federal government's domain of power exclusively and those over which the states shared control. Under this doctrine regulation of the manifold activities connected with commerce became a joint responsibility of the national government and the states. The superior authority of the former would insure protection of general interests against invidious local regulation. The test to be applied in determining the validity of state legislation was definite and direct: state acts must not conflict with those provisions of the Constitution imposing restraints on the states, or with provisions of national laws or treaties. No inquiry as to whether a questioned state act was a "regulation" of commerce or otherwise was required, no attempt to measure its "direct" and "indirect" effects on external commerce, no inquiry into the "purpose" of the act. The effect of the act in obstructing the operation of national laws and treaties, or in contravening specific constitutional limitations upon states, was controlling.

Although the concurrent-powers doctrine thus had strong logical foundations, it had practical shortcomings. It left unanswered the vital question how freedom of the nation's commerce from hampering state regulations should be maintained. It not only assumed a constant oversight of state lawmaking by Congress, but also raised a problem concerning the nature of legislation which Congress might enact to keep commerce free from undesired state regulation. The error of the concurrent-powers doctrine was not so much in its logic as in the fact that powerful economic forces were arrayed against it. Industrialization and improvement in transportation facilities, with an accompanying extension of trade horizons, demanded the freedom from state regulation of commerce which the opposing exclusive-power doctrine afforded. These forces had been instrumental in causing the commerce power to be vested in the national government originally. Their further effect was to cause that grant of power to be interpreted as generally exclusive by the Supreme Court.

There were contrary forces, however, which proved sufficiently great to prevent an immediate and outright acceptance of the exclusive-power theory. The conflict over slavery brought strong support to the side of the advocates of the concurrent-powers concept. The interstate slave traffic was a phase of commercial activity which some proslavery and some antislavery elements wished to be



kept under state control, though for different reasons.<sup>53</sup> The inauguration of state liquor-control policies in the pre-Civil War period also afforded occasion for assertion of the doctrine. It provided a ready basis upon which such regulations might be sustained even though they affected interstate and foreign commerce.<sup>54</sup> The slowness of Congress to exert its full power under the commerce clause, particularly in the field of interstate trade, placed a responsibility upon the states to protect their interests by regulations of their own making, even though external commerce was affected more or less directly.

The concurrent-powers theory reached its greatest ascendancy in judicial favor during the tenure of Chief Justice Taney, who was one of its strongest champions. Although endorsed by individual members of the Supreme Bench, it was never accepted conclusively by the Court as a whole at any time. Acceptance was limited to declarations of individual members in concurring or dissenting opinions which did not carry the weight of a majority of the entire body.<sup>55</sup> After the acceptance of the compromise local-concurrent-powers theory in *Cooley v. Board of Wardens* in 1851 the concurrent-powers theory disappeared from the opinions of the Court. Thereafter a constitutional basis for state legislation affecting interstate and foreign commerce was sought in a broadened concept of the state police power or a concurrent state authority

<sup>53</sup> Stangely enough, in all the bitter struggle over the institution of slavery and its spread the Supreme Court was never required to pass directly upon the question of the power of the states to regulate the interstate traffic in slaves. The Court was faced with this question in the case of *Groves v. Slaughter*, 15 Pet. 449 (U. S.) (1841), but was able to reach a conclusion without passing directly upon it. Nevertheless, the question was given consideration in *dicta* in other cases, particularly those involving the power of states to control immigration, *New York v. Miln*, 11 Pet. 102 (U. S.) (1837), and *The Passenger Cases*, 7 How. 283 (U. S.) (1849). The sharp division of the Court in these two cases reflected realization of the implication of the decisions in reference to the slavery question. The issues in the latter case were argued before the Court on three separate occasions, and the final result was a five-to-four decision, with eight separate opinions being offered by the Court.

<sup>54</sup> *The License Cases*, 5 How. 504 (U. S.) (1847).

<sup>55</sup> See the opinions of Thompson, J., in *New York v. Miln*, 11 Pet. 102, 145 (U. S.) (1837); Taney, Ch. J., and Catron, Nelson, and Daniel, JJ., in *The License Cases*, 5 How. 504, 578, 605, 615 (U. S.) (1847); Taney, Ch. J., and Daniel, J., in *The Passenger Cases*, 7 How. 283, 470, 497 (U. S.) (1849). Chief Justice Taney maintained in the last case cited that the doctrine had received the approval of a majority of the Court in the *License Cases*, but it appears that only four members of the Court clearly espoused it at that time.

to regulate commerce in its local aspects, rather than in a subordinate state authority to regulate interstate and foreign commerce generally.

### C. THE EXCLUSIVE-POWER THEORY

In the light of later developments unusual significance attached to the *dicta* in the *Steamboat Monopoly Case*. In his opinion Chief Justice Marshall employed language strongly suggestive of his approval of the exclusive-power doctrine, thereby laying the foundation for that judicial construction of the commerce clause which applies it as a direct restraint upon state action. In view of opinions of the other members of the Court expressed elsewhere and the general unpopularity of the New York Steamboat Monopoly the probabilities are that Marshall could have had the support of a majority of the Court had he wished to base the decision upon the proposition that the grant of the commerce power to Congress invalidated such state legislation.<sup>56</sup> But mindful of the possibly adverse popular reaction to an outright declaration to this effect, Marshall was content merely to give a guarded approval of the exclusive-power doctrine. The way was left open to a more definite application of it when a case should arise in which the circumstances would make such a course necessary.

The exclusive-power theory received the endorsement of the Court in this tentative fashion:

It has been contended by the counsel for the appellant, that as the word "to regulate" implies in its nature, full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated.

There is great force in this argument, and the Court is not satisfied that it has been refuted.<sup>57</sup>

The adoption of this view, strongly suggestive of Webster's influence upon the Court,<sup>58</sup> necessitated an answer to the arguments

<sup>56</sup> Felix Frankfurter, *The Commerce Clause under Marshall, Taney, and Waite* (1937), p. 16.

<sup>57</sup> *Gibbons v. Ogden*, 9 Wheat. 1, 209 (U. S.) (1824).

<sup>58</sup> In developing his point that the commerce power, at least in some of its parts, should be considered exclusive, Webster had emphasized that "all useful regulation does not consist in restraint; and that which Congress sees fit to leave

drawn from the practice of both Congress and the states, which showed the states in the actual possession and exercise of powers having a more or less direct relation to the conduct of interstate and foreign commerce. Instead of accepting these practices as evidence that the states possessed a concurrent power in commercial regulation, as urged by counsel for the defendant in error, or as admission of a limited concurrent jurisdiction, as suggested in the opposing argument, Marshall proposed to harmonize them with the exclusive-power doctrine by denying to them the character of regulations of commerce.

Such acts, Marshall maintained, must be deemed to be primarily regulations of the internal commerce of the state, or police-power measures for the protection of the public health and safety, or ordinary revenue measures with an incidental bearing upon interstate and foreign commerce. They formed a part of that "immense mass of legislation, which embraces everything within the territory of a state, not surrendered to a general government; all which can be most advantageously exercised by the states themselves."<sup>59</sup> Although the national government and the states might employ the same means to carry out their respective functions, this fact did not constitute proof that they were exercising the same power or powers. Even if conflict occurred between the measures adopted by the two governments, a distinction in the source of authority remained.<sup>60</sup> When such conflict resulted the rule of federal supremacy should be applied.

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free, is a part of its regulation, as much as the rest." *Ibid*, p. 18. Webster himself has been quoted as saying at a later time: "The opinion of the Court, as rendered by the Chief Justice, was little else than a recital of my argument, as that covered the whole ground." See Warren, *op. cit.*, II, 70-71, citing *Reminiscences and Anecdotes of Webster* (1877), by Peter Hervey.

<sup>59</sup> *Gibbons v. Ogden*, 9 Wheat. I, 205 (U. S.) (1824).

<sup>60</sup> "It is obvious, that the government of the Union, in the exercise of its express powers, that, for example, of regulating commerce with foreign nations and among the states, may use means that may also be employed by a state, in the exercise of its acknowledged powers; that, for example, of regulating commerce within the state . . . All experience shows, that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct, to establish their individuality." *Ibid*.

Justice Johnson in a concurring opinion expressed the same thought, p. 235: "It is no objection to the existence of distinct, substantive powers, that in their

This conception of the commerce power as indivisible and, therefore, vested exclusively in Congress was not entirely novel. Reference has been made to the remarks of Madison on this point during the consideration of the tonnage-tax clause in the Convention.<sup>61</sup> During the ratification struggle it had been intimated that in construing the terms of the Constitution some powers conferred upon the national government must be considered as exclusive national powers by reason of their nature, even in the absence of express provisions in the Constitution making them so. This point Hamilton had made clear in the *Federalist*.<sup>62</sup> Though he did not there indicate that he regarded the commerce power as belonging in the exclusive-power category, his remarks in the New York Convention, where he referred to the regulation of commerce, along with the management of foreign relations, as not being a "proper

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application, they bear upon the same subject. The same bale of goods, the same cask of provisions, or the same ship, that may be the subject of commercial regulation, may also be the vehicle of disease. And the health laws that require them to be stopped and ventilated, are no more intended as regulations of commerce, than the laws which permit their importation, are intended to inoculate the community with disease. Their different purposes mark the distinction between the powers brought into action; and while frankly exercised, they can produce no serious collision."

<sup>61</sup> *Supra*, p. 14

<sup>62</sup> No. 32, p. 186. Discussing the general question of the relation between national and state authority he had said "An entire consolidation of the states into one national sovereignty, would imply an entire subordination of the parts; and whatever powers might remain in them, would be altogether dependent upon the general will. But as the plan of the convention aims only at a partial union or consolidation, the state governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States. This exclusive delegation, or rather this alienation of state sovereignty would only exist in three cases: where the constitution in express terms granted an exclusive authority to the union; where it granted, in one instance, an authority to the union; and in another, prohibited the states from exercising the like authority; and *where it granted an authority to the union to which a similar authority in the states would be absolutely and totally contradictory and repugnant.*" (Italics in last clause mine.)

During the debates in the Virginia ratifying convention Marshall, who was a member of it, had said on this point: "The truth is, that when power is given the general legislature, if it was in the state legislature before, both shall exercise it; unless there be an *incompatibility in the exercise* by one to that of the other, or negative words precluding the state governments from it." *Elliot's Debates*, III, 419. (Italics mine.) This would indicate that he did not entertain at that time the idea that any powers of the national government were exclusive in the absence of specific provision to that effect in the Constitution.

concern"<sup>63</sup> of the states, would imply that he considered this power exclusive by its nature.

Decisions of federal courts prior to that in the *Steamboat Monopoly Case* had produced a number of opinions in which the principle of exclusiveness of federal powers by reason of their nature had been approved. Justice Johnson in a circuit court decision the year before had endorsed in the strongest possible terms the idea of exclusiveness of the federal commerce power.<sup>64</sup> Justice Story had insisted that the criminal and admiralty jurisdiction of the federal courts must be considered exclusive by reason of its nature.<sup>65</sup> In other cases the general rule had been stated with approval, although not applied so as to prevent state action.<sup>66</sup>

By the adoption of this view of the indivisibility of the commerce power the Court was able to deny the inference, drawn from the absence of any direct constitutional prohibition, in favor of a concurrent power in the states. Marshall disposed of the argument that the conditional restrictions upon the states in regard to taxation implied that no further limitation upon state regulation of commerce was intended, by pointing out that these clauses had reference to the *taxing* power of the states, not to their power to regulate commerce. The taxing power was admittedly divisible, and the states continued to share in it after the adoption of the Constitution. These special restrictions were necessary to the preservation of national interests in the exercise of this taxing authority by the states. No further inference was warranted.<sup>67</sup>

Justice Johnson went a step further and found in these conditional prohibitions the absolute limit to which state power in reference to commerce could be allowed to extend, even with the consent

<sup>63</sup> Elliot's *Debates*, II, 350.

<sup>64</sup> *Elkison v. Deliesseline*, 8 F. Cas. 493 (No. 4,366) (Cir. Ct., S. C.) (1823). A South Carolina statute required masters of all vessels putting into port to notify port authorities in case there were colored seamen aboard and to allow these colored seamen to be detained in jail until the departure of the vessel. The state statute was held invalid.

<sup>65</sup> *Martin v. Hunter's Lessee*, 1 Wheat. 304, 337 (U. S.) (1816).

<sup>66</sup> In *Sturges v. Crowninshield*, 4 Wheat. 122, 193 (U. S.) (1819), Chief Justice Marshall had stated the principle in the following words: "Whenever the terms in which a power is granted to Congress, or the nature of the power, require that it should be exercised exclusively by Congress, the subject is as completely taken from the State Legislature, as if they had been expressly forbidden to act upon it."

<sup>67</sup> *Gibbons v. Ogden*, 9 Wheat. 1, 198 (U. S.) (1824).

of Congress.<sup>68</sup> Instead of considering them exceptions to the power of the states to control commerce, he thus saw them as exceptions to the exclusive power of Congress to regulate commerce. Needless to state, this extreme view of the limits of state power did not command support in later decisions of the Court. On the whole, little weight could be attached to these ancillary provisions of the Constitution in support of the exclusive-power theory. The case for this theory had to be grounded upon the nature of the power itself, or on the nature of the subjects upon which it operated, and upon the broad purposes underlying the grant of this power to Congress.

According to the view set forth by Marshall in *Gibbons v. Ogden*, the exclusiveness of the commerce power arises from the nature of the power to regulate, not from the nature of the subjects to which the power applies. Admitting that the incidents connected with the carrying on of commercial intercourse were varied, and were not removed entirely from state control, Marshall insisted that authority to *regulate* commerce which was interstate or foreign could reside in only one place. Commerce could be "regulated" only by that government having jurisdiction over it in its entirety. The action of that authority, in whatever degree taken, must necessarily be regarded as setting the limits of regulation in the constitutional sense. The state acts cited in the argument before the Court as evidence of the existence of power in the states to regulate commerce were measures of only a limited and local application, having purposes lying outside those embraced within the scope of the grant of power to Congress. They were, therefore, not "regulations" of commerce in the constitutional

<sup>68</sup> *Ibid.*, p. 237. It was suggested in later cases that the provision in the Constitution prohibiting the giving of preference to the ports of one state over those of another in commercial or revenue legislation (Article I, sec. 9, cl. 6) implied that there could be no state regulation of commerce, at least to the extent that the uniformity thus guaranteed would be destroyed. The Supreme Court refused to draw this meaning from the clause. *Munn v. Illinois*, 94 U. S. 113, 135 (1876), *per* Waite, Ch. J.; *Morgan's, etc., S. S. Co. v. Louisiana State Board of Health*, 118 U. S. 445, 467 (1886), *per* Miller, J. This provision was introduced into the Constitution late in the proceedings on the motion of the Maryland delegation, who insisted that its inclusion was a "tender point" with them, owing to the situation of that state's ports with reference to those of Virginia. The Court's holding that the provision was directed solely toward insuring protection against regulations by Congress oppressive to the weaker or less advantageously situated states is supported by the account of its origin given by Madison. See Madison's *Journal*, pp. 478-479, 483-484, 502-503.

sense. This remained true even when such state acts operated upon the subjects of that part of the national commerce falling within their range. The distinction drawn by the Court in such cases was one between a regulation of commerce by Congress, treating all commerce as a unit, and an exercise of power by the state over a portion of it. The state's action might constitute a regulation of commerce in fact, but not in the constitutional sense.

This view of the relation between national and state power under the commerce clause was practical and, on the whole, not illogical. It admitted the states to a certain range of authority over the incidents of interstate and foreign commerce, and at the same time maintained the principle of exclusiveness of the power of Congress in the strictly regulative sense. The danger of a competition of regulation between Congress and the states which was inherent in the concurrent-powers doctrine was to a certain degree obviated. The framers had apparently expected to impose upon Congress the duty of maintaining a constant watch over state legislation in order to prevent state interferences deemed inimical to national commercial interests. Here the Court set the stage for its own assumption of that responsibility through the voiding of state acts on the ground of interference with the exclusive authority of Congress in commercial regulation. Silence of Congress, implying that commerce should be left free from restraint, could be rendered effective by judicial decree. Inasmuch as the national legislature was slow to exercise in any large measure its authority under the commerce clause, this method of preventing state interference with national commercial interests proved eventually to be a constitutional safeguard of highest importance.

It is obvious that this construction of the commerce clause placed extensive power in the judiciary in ruling upon the validity of state legislative acts having an incidental relation to interstate and foreign commerce. The standard set up for determining the limits of state authority was elastic and uncertain, though none the less real. In passing upon the validity of state measures affecting commerce the Court must presume to ascertain the *purposes* underlying them. By a strongly pro-states'-rights Court the reserved powers of the states might be defined in such liberal terms as to amount virtually to a concession of a subordinate concurrent jurisdiction in the regulation of commerce. Such, in fact, was the practical application

of this doctrine in early cases in which the Court ostensibly made use of it.<sup>69</sup>

Moreover, there began to be developed by the Court a corollary principle that held certain forms of regulation to be so intimately connected with the maintenance of local security and order as to be beyond the reach of the federal power over commerce. A hint of this was to be found in the opinion of the Court given by Justice Barbour in *New York v. Miln* holding that the entry of pauper aliens was subject to the "complete, unqualified and exclusive" control of the states.<sup>70</sup> Although in respect to this particular subject this view was later repudiated by the Court,<sup>71</sup> the pronouncement proved to be a starting point for the development of the doctrine that the reserved powers of the states stand as a bar to the extension of federal regulative authority over certain matters in which local concern is paramount.<sup>72</sup>

On the other hand, the exclusive-power doctrine could very easily be distorted by a nationally minded Court into the doctrine that the federal commerce power was exclusive as regards *all the activities* connected with interstate and foreign commerce. Such an extreme view would reduce to a mere shadow state power to legislate upon matters relating to interstate and foreign commerce. Evidence of a leaning in this direction is found in the dissenting opinion of Justice Story in *New York v. Miln*.<sup>73</sup>

<sup>69</sup> See *Willson v. Blackbird Creek Marsh Co.*, 2 Pet. 245 (U. S.) (1829), upholding an act of Delaware authorizing the building of a dam across a navigable stream; *New York v. Miln*, 11 Pet. 102 (U. S.) (1837), sustaining a state law regulating immigration; *The License Cases*, 5 How. 504 (U. S.) (1847), upholding state legislation requiring licenses for selling liquors, *Gilman v. Philadelphia*, 3 Wall. 713 (U. S.) (1865), sustaining the power of a state to authorize the erection of an obstructive bridge across a navigable stream.

<sup>70</sup> 11 Pet. 102, 139 (U. S.) (1837).

<sup>71</sup> *The Passenger Cases*, 7 How. 283 (U. S.) (1849); *Henderson v. The Mayor of New York*, 92 U. S. 259 (1876). The authority of the states to regulate the interstate migration of Negroes was declared to be exclusive by Taney, Ch. J., and Woodbury, J., in *Groves v. Slaughter*, 15 Pet. 449, 508 (U. S.) (1842), but the issue was not passed upon by the whole Court.

<sup>72</sup> For a discussion of the evolution of this doctrine see Edward S. Corwin, *The Commerce Power versus States Rights* (1936), pp. 107-152.

<sup>73</sup> 11 Pet. 102, 146 (U. S.) (1837). Cf. also the statement of Justice Johnson in *Elkison v. Delhesseline*, 8 F. Cas. 493 (No. 4,366) (Cir. Ct., S. C.) (1823), to the effect that the grant of the commerce power to Congress "sweeps away the whole subject, and leaves nothing for the State to act upon."



The Court was slow to apply the exclusive-power doctrine in such a way as to invalidate state legislation solely on the ground of interference with a dormant federal authority over commerce. Justice Story's assertion in his *Commentaries* that it "had been settled, upon the most solemn declaration, that the commerce power is exclusive in the United States," was no doubt premature.<sup>74</sup> His statement antedated the declaration of Chief Justice Taney in the *Passenger Cases*<sup>75</sup> to the effect that the contrary concurrent-powers theory had been accepted by the Court two years earlier in the *License Cases*. Although individual members of the Court had previously offered opinions holding state acts invalid on the ground of interference with the grant of exclusive authority to Congress over the regulation of commerce,<sup>76</sup> there was no decision of the Court based squarely upon this principle until the *State Freight Tax Case* in 1873.<sup>77</sup> Even here the Court, speaking through Justice Strong, admitted some doubt of the strength of the precedents in support of the position taken by it. Thereafter, under the influence of nationally minded judges, its acceptance and application became a matter of such common occurrence as to make it a truism of American constitutional law.<sup>78</sup> The Court has adopted at different periods attitudes of varying degrees of leniency toward state police-power and revenue measures alleged to be in conflict with the exclusive authority of Congress to regulate interstate and

<sup>74</sup> Story, *op. cit.*, Vol. II, sec. 1063.

<sup>75</sup> 7 How. 283, 470 (U. S.) (1849).

<sup>76</sup> Story, J., dissenting in *New York v. Miln*, 11 Pet. 102, 157 (U. S.) (1837); McLean, J., in *The Passenger Cases*, 7 How. 283, 400, 406 (U. S.) (1849), Chase, Ch. J., and Clifford, J., concurring in *Crandall v. Nevada*, 6 Wall. 35 (U. S.) (1867). In *Steamship Co. v. Portwardens*, 6 Wall. 31, 34 (U. S.) (1867), the Court, without dissent, held invalid a state statute authorizing the collection of a fee by port wardens at the Port of New Orleans on the ground of interference with the power of Congress over the regulation of commerce, but in this case the constitutional prohibition of state tonnage taxes without the consent of Congress was also held applicable.

<sup>77</sup> 15 Wall. 232 (U. S.) (1873).

<sup>78</sup> Justice Day in *New Mexico v. Denver and Rio Grande R.R. Co.*, 203 U. S. 38, 49 (1906), stated the accepted view of the Court on the matter when he said: "It has been too frequently decided by this Court to require restatement of the decisions that the exclusive power to regulate commerce is vested by the Constitution in Congress."

According to Bernard C. Gavit, *The Commerce Clause of the United States Constitution* (1932), sec. 7, p. 16, up to 1932 there had been approximately one hundred and eighty cases in which state acts had been held invalid by the Supreme Court under the commerce clause when no action by Congress was involved.

foreign commerce, but these differences in viewpoint have not required the denial of this basic theory of the relationship of state and federal power in this sphere.

#### D. THE LOCAL-CONCURRENT-POWERS THEORY

In the argument of counsel for the plaintiff in error before the Court in the *Steamboat Monopoly Case* is to be found also a suggestion of the view of the commerce power later to be elaborated by the Court into what has become known as the "local-concurrent-powers" doctrine. This conception of the relationship of state and federal authority under the commerce clause represents essentially a fusion of the opposed concurrent-powers and exclusive-power theories. It holds that the question of the exclusiveness of Congressional authority to regulate is dependent upon the nature of the *subject* dealt with, not upon the nature of the *power* involved. Two classes of subjects occur in the field covered by the commerce power of Congress. One includes matters which, owing to their susceptibility to diversity of treatment in accordance with state law, may be regulated by the states in the absence of federal regulation to the contrary. The other includes those which, by reason of the national interests involved and the necessity for uniformity of treatment, may be dealt with only by national law for national purposes.<sup>79</sup>

As has been seen, the Court in *Gibbons v. Ogden* ignored this rationalization in justifying the operation of state laws upon commerce. Chief Justice Marshall chose to give state legislation affect-

<sup>79</sup> Attorney General Wirt, whose argument expressed in clearer terms than Webster's this concept of a division of the subject matters, stated the point as follows "Some subjects are, in their nature, extremely multifarious and complex. The same subject may consist of a great variety of branches, each extending itself into remote, minute and infinite ramifications. One branch alone, of such a subject, might be given exclusively to Congress, (and the power is exclusive only so far as it is granted,) yet, on other branches of the same subject, the States might act, without interfering with the power exclusively granted to Congress. Commerce is such a subject. It is so complex, multifarious and indefinite that it would be extremely difficult, if not impracticable, to make a digest of all the operations which belong to it. One or more branches of this subject might be given exclusively to Congress; the others may be left open to the States. They may, therefore, legislate on commerce, though they cannot touch that branch which is given exclusively to Congress." *Gibbons v. Ogden*, 9 Wheat. 1, 165 (U. S.) (1824).

Webster's contribution on this point was merely to insist that the commerce power in its "higher branches" was vested exclusively in Congress. *Ibid.*, p. 9.

ing commerce a basis in a power distinct from the commerce power. For some time after this decision the Court continued to attempt to resolve the issue either by an absolute denial of the commerce power to the states or by concession of it to them in a complete sense, subject to the specific restraints in the Constitution and to a paramount authority in Congress. Eventually the local-concurrent-powers theory was championed by one member of the Court in an attempt to find a basis upon which the contending groups could come to agreement. The theory was taken up and advocated by Justice Woodbury in the *License Cases*.<sup>80</sup> Later, in the *Passenger Cases*, the same Justice elaborated it more fully.<sup>81</sup> His opinion in the latter case, holding the commerce power to be exclusive only in matters of "external, general and uniform cognizance," heralded the acceptance of the local-concurrent-powers doctrine by a majority of the Court two years later in the case of *Cooley v. Board of Wardens*.<sup>82</sup>

This case arose through an action to enforce payment of a half-pilotage fee upon the owner of two vessels engaged in the interstate coastal trade. The validity of the state act under which the fee was claimed was assailed on various grounds. It was maintained that the fee was a duty, levied without the consent of Congress and in violation of the uniformity rule of taxation in Article I, section 8, of the Constitution. Further contentions were that the pilotage law was in conflict with regulations of commerce made by Congress and that Congress had exclusive power over the subject. The defense sought to justify the act as a valid exercise of the state's police powers for the safety of shipping. Attention was also directed to an act passed in 1789<sup>83</sup> by which Congress had manifested its intention to leave the regulation of pilotage in the hands of the states.

It fell to the lot of Justice Curtis, the successor to Justice Woodbury upon the Supreme Bench, to present the majority opinion of the Court. The Court found that there was no weight in the contentions based upon the clauses in the Constitution relative to taxation. But it admitted that the act was a regulation of commerce falling within the scope of federal regulative authority. The suggestion that the measure was a police-power enactment was rejected, which closed the door to the application of the exclusive-

<sup>80</sup> 5 How. 504, 624 (U. S.) (1847).

<sup>81</sup> 7 How. 283, 559 (U. S.) (1849).

<sup>82</sup> 12 How. 299 (U. S.) (1851)

<sup>83</sup> 1 Stat. 53.

power doctrine. The Court was forced back upon the concurrent-powers doctrine as affording a logical basis for sustaining the act, or upon the theory that the federal act of 1789 had "adopted" the state act as a part of a system of federal regulation.<sup>84</sup> The local-concurrent-powers theory offered a way out of the dilemma. The state act was sustained on the ground that the states were competent to act concurrently on matters of local concern where uniformity of regulation was not feasible or necessary, even though such acts were clearly commercial regulations. Marshall and other advocates of the exclusive-power theory had emphasized that undivided control over commerce was vested in Congress by reason of the indivisibility of the *power* itself. The Court now changed the emphasis to the nature of the *subjects* upon which it operated. The authority of Congress was declared to be exclusive only in that range of subject matters where uniform national laws were required by reason of the *character of the subjects dealt with*. Elsewhere, Congressional authority was only paramount.<sup>85</sup>

In applying this theory the Court could avoid the troublesome question of whether a particular state measure was a regulation of commerce or a police-power enactment, as necessitated by the doctrine of exclusiveness. But another equally troublesome problem was raised. In applying the local-concurrent-powers doctrine con-

<sup>84</sup> The part played by the "adoption" theory in the opinion is discussed *infra*, pp. 360-363.

<sup>85</sup> This important innovation in the constitutional theory of the relationship between state and federal authority under the commerce clause was stated and justified in the majority opinion in the following language:

"But when the nature of a power like this [the commerce power] is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive legislation by Congress. Now the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature, some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port, and some, like the subject now in question, as imperatively demanding that diversity of treatment which alone can meet the local necessities of navigation.

"Either absolutely to affirm, or deny that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." *Cooley v. Board of Wardens*, 12 How. 299, 319 (U. S.) (1851)

troverſy would neceſſarily ariſe in determining whether or not a particular matter was one ſuſceptible of that diverſity of regulation which ſtate laws effected, or was one requiring in its nature a general and uniform treatment through national law. Little was gained in the long run in making clearer the line between ſtate and federal powers in the field of commercial regulation. "Suſceptibility to diverſity of treatment in regulation" was no leſs elastic a ſtandard than "police-power purpoſe." Great latitude of judgment remained with the Court in deciding whether a given ſtate ſtatute invaded the excluſive domain of Congreſs. What the Court gained in one direction in freeing itſelf of an eſſentially legislative function in paſſing on the *purpoſe* of a local enactment, it loſt in another in aſſuming to paſs on the *neceſſity of a uniform ſystem of regulation* in relation to a particular ſubject.

The opinion in *Cooley v. Board of Wardens* may be regarded as marking the end of the period of vacillation by the Court on the queſtion of admittance of the ſtates to participation in the control of interſtate and foreign commerce in the purely regulative ſenſe. The Court adheres to the excluſive-power theory, as modified by the doctrine ſet forth in this caſe. It has declared the doctrine of *Cooley v. Board of Wardens* to be "firmly eſtabliſhed"<sup>86</sup> and expreſſive of the "final judgment of the Court" on the queſtion.<sup>87</sup> State power has been upheld in accordance with the local-concurrent-powers theory in numerous inſtances, upon citation of this caſe for authority.<sup>88</sup> The Court has never attempted any complete enumeration of the ſubjects falling within the local-concurrent-powers ſphere, preferring a caſe-to-caſe method of defining the limits of ſtate authority under this doctrine. Among the matters which have been ſo held to be within ſtate control are pilotage, quarantine and inſpection, harbor police, improvement of navigation channels, regulation of wharves, piers, and docks, conſtruction of dams and bridges acroſs navigable ſtreams, and the eſtabliſhment of interſtate ferries.

In many inſtances in which the local-concurrent-powers doctrine

<sup>86</sup> *Bowman v. Chicago and Northwestern Ry. Co.*, 125 U. S. 465 (1888).

<sup>87</sup> *County of Mobile v. Kimball*, 102 U. S. 691, 702 (1880). For a recent opinion endorsing the doctrine ſee *Townſend v. Yeomans*, 301 U. S. 441, 445 (1937).

<sup>88</sup> A partial liſt of ſuch caſes is given in *Covington and Cincinnati Bridge Co. v. Kentucky*, 154 U. S. 204, 211 (1894), and *The Minnesota Rate Caſes*, 230 U. S. 352, 402 (1913).

would seem to have been applicable, the Court has ignored it as a basis for sustaining state action. It has preferred to use language that clearly accords with the unqualified exclusive-power or "classification-of-powers" doctrine<sup>89</sup> as originally set forth in *Gibbons v. Ogden*. As a matter of fact, the Court employs the exclusive-power and local-concurrent-powers theories interchangeably, and in its reasoning often confuses them to a great extent.<sup>90</sup> Generally speaking, the Court has so limited the application of the latter in defining state authority that substantially the same results could have been reached by following the former.<sup>91</sup> In recent years it has exhibited a tendency to rely less frequently upon the local-concurrent-powers concept and more upon a broadened view of state police and revenue powers as a basis for upholding state acts relating to interstate and foreign commerce. Although it has been widely criticized by commentators, the local-concurrent-powers doctrine has never been repudiated by the Court.<sup>92</sup> Together with the exclusive-power theory, it enables the Court to admit the validity of some state legislation bearing more or less directly upon interstate and foreign commerce, while maintaining that in other matters of regulation national control is exclusive.

<sup>89</sup> This theory was so designated by Professor John B. Sholley in "The Negative Implications of the Commerce Clause," 3 *University of Chicago Law Rev.* 556 (June, 1936).

<sup>90</sup> An illustration is the fact that, while the Court commonly cites the *Cooley* case as authority for holding pilotage laws of the states to be valid *regulations of commerce* under the local-concurrent-powers doctrine, as in *Ex parte McNeil*, 11 Wall. 236 (U. S.) (1871), *Wilson v. McNamee*, 102 U. S. 572 (1880), and *Olsen v. Smith*, 195 U. S. 332 (1904), it has on occasion cited the same case as illustrative of the principle that a state may enact legislation of this type under its *police power*, as in *Lake Shore, etc., R. R. v. Ohio*, 173 U. S. 285, 298 (1898).

<sup>91</sup> Gavit, *op. cit.*, sec. 3, p. 7; James S. Rogers, "The Exclusiveness of the Power of Congress over Interstate and Foreign Commerce," 44 *American Law Reg.* (N. S.) 529, 533, 547 (Sept., 1905).

<sup>92</sup> The theory has been criticized from the standpoint of both the logical basis upon which it rests and the manner in which it has been applied by the Court. See Sholley, *op. cit.*, p. 592; Gavit, *op. cit.*, sec. 9, p. 19; Charles K. Burdick, *The Law of the American Constitution* (1922), sec. 94, p. 245; Wiloughby, *op. cit.*, II, sec. 598, p. 1004; Clarence G. Shenton, "Interstate Commerce during the Silence of Congress," 23 *Dickinson Law Rev.* 107 (April-May, 1919); David W. Brown, "The Exclusive Power of Congress to Regulate Interstate and Foreign Commerce," 4 *Columbia Law Rev.* 490 (Nov., 1904), and "The Concurrent Power of the States to Regulate Interstate and Foreign Commerce," 5 *Columbia Law Rev.* 298 (April, 1905).

### 3. THE RÔLE OF CONGRESS IN DEFINING THE SPHERE OF STATE POWER OVER COMMERCE

DETAILED consideration of the extent to which the Supreme Court has permitted state acts to stand when tested in the light of the commerce clause is not within the limits of the present study. Attention is to be given primarily to Congressional acts which have provided a basis for the extension of state powers or influence in this field. The various theories of the commerce clause as a limitation on state power carry with them widely different implications concerning the authority of Congress to permit or sanction state regulations of commerce.

An essential point of difference among these various theories lies in the significance attaching to Congressional inaction or silence. Under all of them failure of Congress to give its consent prevents the levying of tonnage duties by the states and the laying of taxes upon imports and exports by them in excess of the amounts necessary for inspectional expenses. The Constitution makes the exercise of power by the states in these matters clearly dependent upon approval by Congress. These two matters, however, do not cover the whole field of potential state action. Under the general concurrent-powers doctrine failure of Congress to exercise its authority in regard to any phase of regulation other than these is tantamount to admission that the states may legislate thereon. This is also true under the local-concurrent-powers theory in respect to matters that are of local concern and in their nature susceptible of that diversity of treatment which state regulation might be deemed to afford. With regard to other matters, according to this theory, the silence of Congress indicates its will that commerce shall be free from restraints. The conditionally-exclusive-power rule places significance upon the silence of Congress only in respect to further regulation of subjects upon which it undertakes to act. Unless provision is made to the contrary, federal regulations on any subject are to be considered complete, admitting of no direct or indirect conflict or amplification through state statutes.

The exclusive-power theory denies to the states any power to regulate interstate and foreign commerce in the constitutional sense. Under it the implication to be derived from the silence of Congress is therefore nil so far as direct regulation of commerce by the states is concerned. Failure of Congress to act may be of sig-

nificance in preserving the widest possible scope of operation for bona fide state police-power or revenue measures; but neither the silence of Congress nor its action can have any effect in enlarging the range of state power *to regulate* such commerce in the constitutional sense, because all regulatory power has been placed in the hands of Congress exclusively.

A corollary consideration is the bearing of these different theories on the question of the power of Congress to relinquish control over interstate and foreign commerce to the states. Under the general concurrent-powers theory, Congress may withdraw from any part of the field of regulation and thereby permit the states to enter. But, as has been noted above, this theory of the commerce power has been repudiated by the Court. The conditionally-exclusive-power principle carries with it no definite implication on this point. Relinquishment to the states of control over a subject by Congress may or may not permit the states to exercise power over it; for this principle goes only so far as to lay down a rule regarding settlement of conflicts between state and federal statutes where there has been positive action by Congress or the treaty-making authority.

Under the exclusive-power and local-concurrent-powers theories, withdrawal by Congress from that part of the field where federal and state jurisdictions overlap, as well as failure to occupy it, will have the effect of giving a wider range of action to the states. Where state authority is held to be restrained by reason of the exclusiveness of national power to regulate commerce and the requirement of uniformity of treatment, this result would not necessarily follow Congressional withdrawal. Whether the prohibition of state action applies by reason of the *grant* of the commerce power to Congress or by virtue of the *silence of Congress* is a question that must be met. This requires clarification of the point whether the fixation of the line between those matters which cannot be reached by state regulations and those which can is a strictly judicial question, involving the determination of the meaning of the terms "to regulate" and "commerce"; or a strictly legislative question, determined by Congress as a matter of policy; or a question that is partly determinable by judicial action and partly by legislative action.

If this is strictly a judicial question, then it would appear that neither action nor inaction by Congress can change the extent of



states' powers to regulate interstate and foreign commerce when the exclusiveness of the federal power bars state legislation. This would be true whether the cause for exclusion of the states was the indivisible nature of the regulatory power or the national character of the subject of regulation. If the dividing line between state and federal power over interstate and foreign commerce is a jurisdictional one inherent in the system of federalism, logic would seem to require that a subject held by the Supreme Court to be beyond state regulative authority under the commerce clause could not be subjected to *state regulation* by a declaration of Congress. In the field where federal power is exclusive the silence of Congress could seemingly have no implication except to indicate that no regulation whatsoever is to be had. Positive action by Congress could have no more effect than silence in admitting the states to an exercise of regulative power in this range. Otherwise there would result by its action a delegation of an exclusive federal power to the states, a proceeding contrary to the fundamental assumptions upon which the federal plan rests.

In cases involving the commerce clause as a limitation upon state powers the usual assumption has been that the Court enforces a constitutional, not a legislative, limitation. State authority has been denied generally for the reason that the nature of the subject dealt with or the nature of the power involved requires regulation by Congress if there is to be any. If the Supreme Court permits Congress to override a judicial ruling that a subject or a mode of regulation lies within the field of power assigned to Congress exclusively by the Constitution, one or the other of two propositions must be admitted: either the determination of what part of the federal authority over commerce shall be considered exclusive is primarily a legislative question, or Congress may delegate its "exclusive" power of regulation to the states. Only through one or the other of these concessions can the Court justify a change in its ruling on the scope of the concurrent power of states to regulate commerce to accord with an expression of view by Congress on the matter. The first concession involves virtually an admission that the power of Congress in regulating commerce is merely paramount to that of the states, not exclusive. The latter concession involves a denial of the basic theory upon which the constitutional division of powers between the nation and the states rests.

Another consideration which arises concerns the nature of Con-

gressional authority to "adopt" state legislation in regard to a given subject matter and make such state laws a part of a system of national regulation. May state "police-power" regulations be made federal commercial regulations by the process of incorporation by reference? May Congress by adoption validate state laws invalid in the absence of such federal action? May such adopted legislation be given effect by federal action in fields lying outside the jurisdiction of the state originally enacting it? To what extent is such adopted legislation placed beyond the power of the state to amend or annul? If state acts are made a part of a system of federal regulation by adoption, it would seem that such acts are taken entirely from the control of the states so far as changes may affect their force as federal laws. To permit state repeal or amendment of them as federally enforceable statutes is to sanction the repeal or the amendment of federal laws by the states. This amounts to a delegation of the federal legislative power to the states, even if there is no question concerning the validity, in the first instance, of the state laws concerned.

Closely connected with this general problem is that of the extent of the authority of Congress to aid in the enforcement of state regulations by providing penalties through enactments under the commerce power to secure their observance. As such state regulations become in a constructive sense a part of the system of federal commercial regulations, the same questions arise here as in the case of outright federal adoption. Particularly pertinent is the question of the extent to which future action by the states may be allowed to modify the policy of the federal government implied in such indirect adoptions of state statutes.

Further questions concerning the relationship between the central government and the states are involved in such complementary federal laws. May Congress in this manner subject commerce to a regime of regulation varying from state to state as local regulatory policies vary, when the subject matter of commerce involved has been held by the Supreme Court to be susceptible only to a uniform national system of regulation? Is Congress competent to impose penalties for the violation of laws which it could not itself enact? May Congress enable a state to establish a regime of regulation for interstate commerce terminating or originating therein different from that applied by the state to its internal commerce in the same subject matter?

These questions have been posed before the Supreme Court in increasing number in recent years. In meeting them the Court has shown a disposition to give Congress a free hand in dealing with the points at issue. In conformity with Congressional statute it has changed its views on the authority of the states to regulate certain subject matters of commerce. It has sanctioned a system of federal assistance in the enforcement of state laws through the commerce power. It has permitted Congress to incorporate state laws into the plan of federal regulation in force on specified subjects. The Court's submission to Congressional influence in the elaboration of the theory of federal and state relationships in the regulation of commerce has gone far toward discrediting in large measure long-established constitutional dogmas. A new theory of constitutional relationships in this field seems to be in the process of formulation.

## CHAPTER III

### REGULATION OF COMMERCE BY DIVESTMENT: THE WILSON ACT

THE early efforts of the Supreme Court to formulate a consistent theory of the relationship between state and national power in the regulation of commerce have been noted. Within sixty years after *Gibbons v. Ogden* more than one hundred cases involving a construction of the commerce clause had been heard by it.<sup>1</sup> The principle of exclusiveness of the power of Congress over commerce where the national character of the subjects dealt with required a uniform system of regulation had been definitely established. Beginning in 1873 with the *State Freight Tax Case*,<sup>2</sup> the Court introduced the practice of annulling state legislation on the ground of interference with an exclusive, though unexercised, power of Congress over commerce. In the following decade this principle was applied with increasing frequency to void state statutes, with the result that the commerce clause rapidly achieved a place of primary importance as a limitation on state power.

The progress of judicial elaboration of the Constitution in this direction was eventually carried to such a point that in one important instance Congress was induced to attempt to overcome by legislative act the effect of the Court's interpretation of the commerce clause as a limitation on state authority. Thereupon the power of Congress to "divest" goods of the protection against state regulation afforded by their interstate character was recognized by the Supreme Court. The foundation for the adoption of this new theory of the relationship of national and state power over interstate commerce had been laid by the Supreme Court in earlier cases through the development of the "original-package" and the "silence-of-Congress" doctrines. A consideration of their origins is therefore in order.

<sup>1</sup> A convenient summary of cases involving the commerce clause up to 1932 may be found, arranged in chronological order, in Bernard C. Gavit, *The Commerce Clause of the United States Constitution* (1932), Appendix A.

<sup>2</sup> 15 Wall. 232 (U S) (1873).

## 1. FOUNDATIONS OF THE DIVESTMENT THEORY

## A. THE "ORIGINAL-PACKAGE" DOCTRINE

ANY attempt to develop a theory of the relationship between state and federal power over commerce necessitates the determination of the point at which goods moving in interstate or foreign commerce cease to be subject to federal power and fall into the category of domestic articles over which the states have complete authority. The problem is an infinitely difficult one, as complicated as the numerous manifestations of commercial activity itself. Fundamentally it is that of defining the term "commerce." In view of the complexities of the problem it is not surprising that the rule first propounded by the Court as a guide in cases involving this question did not prove to be fully adequate, and that it was later subjected to endless modification, extension, qualification, and restatement.

The Court addressed itself to this matter in 1827, three years after it had first considered the general question of state-federal relations in the control of commerce in *Gibbons v. Ogden*. A tentative solution was reached by the formulation of the so-called "original-package" rule for determining the time and condition during which the power of the federal government might reach goods moving in commerce and, incidentally, protect them against state-imposed burdens and restrictions. A case arose from an attempt by the state of Maryland to require all importers of foreign goods and all wholesalers dealing in them to pay a license tax of fifty dollars. The Court found the statute to be in effect a duty upon imports levied without Congressional permission, and contrary to the provisions of federal tariff statutes authorizing imports.<sup>3</sup> To reach this conclusion it was necessary for the Court to determine the scope and applicability of the constitutional prohibition against state taxation of imports. Counsel for the state argued that federal power over imports necessarily ceased with the act of importation; and that when they had come to rest in the jurisdiction of a state and obligations to the national government had been met by payment of duties, state authority over them became complete. This view the Court rejected.<sup>4</sup>

<sup>3</sup> *Brown v. Maryland*, 12 Wheat. 419 (U. S.) (1827).

<sup>4</sup> Justice Thompson was alone in dissent. He accepted the view of the state's counsel, one of whom was Roger B. Taney, later Chief Justice of the Supreme Court.

Stating the view of the Court on the point, Chief Justice Marshall said:

... there must be a point of time when the prohibition ceases, and the power of the state to tax commences; we cannot admit that this point of time is the instant that the articles enter the country . . .

It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution.<sup>5</sup>

The Chief Justice observed in conclusion that he "supposed the principles laid down in this case to apply equally to importations from a sister State."<sup>6</sup>

It has been suggested that in adopting the test of "incorporation into the mass" as the point of termination of federal power over goods in commerce, the Court was making an adaptation of the civil-law doctrine of "confusion of goods," with the modification that complete loss of identity of the goods was not required to terminate the federal jurisdiction.<sup>7</sup> However this may be, upon analysis the statement of the rule by the Chief Justice is found to embrace the following propositions: (1) Goods in the possession of the importer in the *original form or package* must still be regarded as under the protection of the federal power; (2) Such protection is lost by *incorporation of the goods into the mass of property* in the state; (3) Incorporation results from *certain actions of the possessor upon the goods*; (4) A result of incorporation may be, but is not necessarily, the *loss of distinctive character as an import*. The key to the rule as stated was not whether the goods were still in the original package, nor yet whether they had lost their distinctive character as imports, but whether an *act* had occurred on the part of the possessor having the effect of incorporating the goods into the common mass of property.

<sup>5</sup> *Brown v. Maryland*, 12 Wheat. 419, 441 (U. S.) (1827).

<sup>6</sup> *Ibid.*, p. 449.

<sup>7</sup> Noel T. Dowling and F. Morse Hubbard, "Divesting an Article of Its Interstate Character," 5 *Minnesota Law Rev.* 100, 128, note 42 (Jan., March, 1921). This article proved extremely helpful to the writer in tracing the evolution of the divestment theory through judicial pronouncements in cases involving the original-package rule.

What acts might be deemed to constitute incorporation? In answering objections that this rule might seriously embarrass the states in the exercise of their police and taxing powers the Chief Justice indicated a number of ways by which incorporation might be accomplished. Those mentioned were sale, breaking up of the original packages for disposal at retail, and conversion to the importer's own use.<sup>8</sup> As for the objection that the rule might prevent regulation of the introduction of articles of a deleterious nature, the Court stated that in such cases state power might attach immediately without reference to the fact of incorporation.<sup>9</sup> It was evident that the Court considered incorporation to be a physical fact, dependent wholly upon action by the possessor of the goods and not upon retention of distinctive character as an import.

Could the acts constituting incorporation be subject to legislative determination? As the Court was concerned here only with the question of how far the authorization of importation protected the importer's right to disposal of the goods up to the point of incorporation, the opinion threw little light on this point. The declaration was made that the right to sell, that is, the right to incorporate, goods introduced into a state in foreign commerce was so intimately bound up with the right to import that the one could not be separated from the other in regulating foreign commerce.<sup>10</sup> But it was also stated that the right to introduce and the right to incorporate were both subject to federal control.<sup>11</sup>

These statements could be interpreted as meaning either that Congress might legislate upon the subjects of introduction and in-

<sup>8</sup> *Brown v Maryland*, 12 Wheat 419, 443 (U S) (1827).

<sup>9</sup> *Ibid.*, p. 444. "The removal or destruction of infectious articles is undoubtedly an exercise of that police power and forms an express exception to the prohibition we are considering."

<sup>10</sup> *Ibid.*, p. 446: "Sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce."

And p. 448: "We think, then, that if the power to authorize a sale exists in Congress, the conclusion that the right to sell is connected with the law permitting importation, as an inseparable incident, is inevitable."

<sup>11</sup> *Ibid.*, p. 448. "Any charge on the introduction and incorporation of the articles into and with the mass of property in the country must be hostile to the power given Congress to regulate commerce, since an essential part of the regulation, and principal object is to prescribe the regular means for accomplishing that introduction and incorporation."

corporation separately or that legislation governing introduction must necessarily cover the subject of incorporation in itself, the two being incapable of separate legislative determination. It is probable that the Chief Justice had in mind the latter thought. Certainly there was no intimation elsewhere in the opinion that Congress might wish to make its authorization of introduction bear any other implication than authorization of a right to incorporate as determined by facts judicially discovered. Sixty years later, however, the Supreme Court had carried its refinement of the original-package rule to the point of treating the right of incorporation by sale as an "incidental" part of the process of commercial intercourse which Congress might by law subject to state control. The fact of incorporation as determined by the Court became subordinate to a legislative definition of the acts constituting incorporation.

Prior to that time the Court, through adjudication of a number of state taxation cases, had effected an extension of the original-package doctrine into the interstate commerce field. It had also introduced significant modifications of the doctrine in reference to the effect of federal jurisdiction over a subject in limiting a state's taxing power. In the *License Cases*, decided in 1847, the Court had before it three cases involving the validity of liquor dealers' license laws of New Hampshire, Massachusetts, and Rhode Island. The Court was unanimous in holding the state license laws valid in all instances as against a contention of interference with the federal commerce power;<sup>12</sup> but the opinions of the individual members of the Court disclosed a considerable diversity of views on the issues involved. This difference of opinion extended to the matter of the applicability of the original-package rule in marking the limits of the federal commerce power in the interstate field. A majority of the members of the Court appear to have accepted this rule as determinative on the point in both the interstate and foreign fields of commercial regulation, but there were still a minority who refused to agree.<sup>13</sup>

<sup>12</sup> 5 How. 504 (U. S.) (1847). The Massachusetts (*Thurlow v. Massachusetts*) and Rhode Island (*Fletcher v. Rhode Island*) cases concerned sales of imported liquors by dealers who were not the original importers. The New Hampshire (*Pierce v. New Hampshire*) case involved an original-package sale of liquors introduced from another state.

<sup>13</sup> The original-package doctrine was approved, either in direct terms or by implication, by Chief Justice Taney, *ibid.*, p. 575; Catron and Nelson, JJ., *ibid.*, p. 610; and McLean and Grier, JJ., *ibid.*, p. 589. Daniel and Woodbury,



The applicability of the original-package rule in determining the range of federal jurisdiction over goods in interstate commerce was inferentially approved by the Court in two state tax cases decided in 1868. In one case a license tax upon auctioneers selling goods, some of which were introduced from other states, was held valid.<sup>14</sup> In the second case a gallonage tax upon the sale of liquors imported from other states was sustained.<sup>15</sup> The Court admitted that the taxes in question applied indirectly in the one case, and directly in the other, to goods still subject to the federal commerce power. It maintained, however, that the taxes were valid since there was no element of discrimination against goods in interstate commerce. At the same time that these decisions were made a ruling was given in another tax case which tended to clarify further the Court's position in regard to the original-package rule in the foreign field. The Court reaffirmed the principles announced in *Brown v. Maryland*, but held that the federal commerce power did not extend protection against the state taxing power to goods in the hands of a purchaser who was not the importer. Sale of goods in the original package by the importer was held to cause them to lose their distinctive character as imports and subject them to state authority.<sup>16</sup>

By 1868, therefore, the Court had developed the theory of the commerce clause in relation to state taxation to the point of accepting the original-package rule as a test for determining the scope of federal jurisdiction over goods in interstate as well as foreign commerce. An important qualification was made in that the Court held that the existence of federal jurisdiction in the interstate field did not operate automatically to defeat nondiscriminatory state taxation of the sale of original-package goods.

In cases decided within the following two decades the Court evinced a disposition to rely even less upon the original-package rule as a definitive test in determining whether a state could apply its tax measures to articles still subject to the federal commerce

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JJ., indicated their disapproval of it, *ibid.*, pp. 614, 620. The former devoted his entire opinion to an attack on this principle.

<sup>14</sup> *Woodruff v. Parham*, 8 Wall. 123 (U. S.) (1868). The Court also held that the constitutional prohibition against state taxation of imports without Congressional consent was inapplicable to imports from another state.

<sup>15</sup> *Hinson v. Lott*, 8 Wall. 148 (U. S.) (1868).

<sup>16</sup> *Waring v. The Mayor*, 8 Wall. 110 (U. S.) (1868). The same point had been ruled upon in the *License Cases*; see *supra*, p. 55.

power. In *Brown v. Maryland* the position of the Court had been that goods remained subject to the federal commerce power and were therefore protected against state taxation until they were incorporated into the mass of property in the state by act of the importer. While still accepting this rule as a test of the limits of federal jurisdiction, the opinions of the Court in the 1870 decade began to indicate that the fact of incorporation was not necessarily governing on the point of termination of protection against the operation of state laws.

On the one hand the Court continued to extend the doctrine of the *License Cases* and *Woodruff v. Parham* by holding that articles of commerce, while still within the range of federal jurisdiction under the original-package rule, were subject to nondiscriminatory taxation by the states. On the other hand the protective influence of the commerce power against discriminatory taxation was held to extend to goods so long as they retained the *character of imports*. Loss of protection conferred by the federal commerce power was made to turn upon "loss of character as an import" rather than upon the fact of incorporation into the mass as determined by definitely prescribed acts of the importer. In other words, the test of the validity of state revenue measures in relation to articles introduced into the state was not whether the goods had actually ceased to be subject to the federal regulatory authority by reason of certain operations upon them by the importer but whether the state's revenue measures discriminated against them in their character as imports.

These tendencies were clearly manifested in *Welton v. Missouri*, a case involving the validity of a state license tax upon peddlers of goods produced outside the state. In holding the state tax invalid the Court endorsed the doctrine of *Brown v. Maryland* as to the circumstances which mark the termination of federal jurisdiction and consequent protection against "hostile and interfering" state legislation. But Justice Field, who gave the Court's opinion, went on to say:

Following the guarded language of the Court in that case [*Brown v. Maryland*], we observe here, as was observed there, that it would be premature to determine when the commerce power of the Federal Government over a commodity has ceased, and the power of the State has commenced. It is sufficient to hold now that the commerce power continues *until the commodity has ceased to be the subject of discrimination by reason of its*

*foreign character. That power protects it, even after it has entered the State, from any burdens imposed upon it by reason of its foreign origin.*<sup>17</sup>

It is evident from this statement that the Court was not so much concerned with the fact of mingling with the mass by act of the importer as it was with the fact that there must be no discrimination against goods in their *character as imports*.<sup>18</sup> This qualification upon the earlier statements of the Court with respect to the termination of the protective influence of the federal commerce power was made clearer in a *dictum* in another tax case four years later. The Court there declared that the commerce power of Congress protected imported goods against state discrimination, even after there had been a mingling with the mass of property in the state.<sup>19</sup>

These opinions disclose that the Court was converted to the acceptance of the original-package rule in the interstate field, but that it was unwilling to accept it as the *absolute* test in determining the limit of the protective influence of federal power. From this position the Court moved easily to the next one: viz, since the power of regulation of interstate commerce belonged in Congress, that body was vested with ultimate responsibility in protecting such commerce against burdensome state regulations, so far as the federal jurisdiction extended.

This was the implication of the language used by the Court in deciding another state tax case in 1885, wherein the Court upheld the validity of a Louisiana general property tax upon coal brought

<sup>17</sup> 91 U. S. 275 (1875). *Italics mine.*

<sup>18</sup> *Ibid.*, p. 282. The shift in emphasis is apparent when the statement of Justice Field in this case is compared with his pronouncement on the same point four years earlier in *Low v. Austin*, 13 Wall. 29 (1871). The issue involved in the earlier case was the validity of a California property tax upon imported wine held by the importer in the original package. The Court, following the reasoning of *Brown v. Maryland*, declared the tax to be in effect an import duty unauthorized by Congress and therefore unconstitutional. Regarding the point of termination of federal jurisdiction, Justice Field had then declared (p. 34): "...goods imported do not lose their character as imports, and become incorporated into the mass of property of the State, *until they have passed from the control of the importer or been broken up by him from the original cases.* Whilst retaining their character as imports, a tax upon them, in any shape, is within the constitutional prohibition" (*Italics mine.*)

<sup>19</sup> *Machine Company v. Gage*, 100 U. S. 676, 678 (1879), *per* Justice Swayne: "This commerce power applies to articles taken from one State into another, until they become mingled with and a part of the property of the latter, and *thereafter* protects such articles from any burden imposed by reason of their foreign origin." (*Italics mine.*)

into that state from Pennsylvania. The Court held that the coal, although still upon the barges in which it had been transported into Louisiana, was subject to a general property tax. But it continued:

When Congress shall see fit to make a regulation on the subject of property transported from one State to another, which may have the effect to give it a temporary exemption from taxation in the State to which it is transported, it will be time enough to consider any conflict that may arise between such regulation and the general taxing laws of the State.<sup>20</sup>

This was a straw in the wind showing an inclination upon the part of the Court to take Congressional declaration of policy into account in ruling upon the question of the subjection of a commodity in interstate commerce to a state's taxing power. Incorporation of imported goods into the local mass by acts of the importer had to a certain extent become dissociated from federal jurisdiction over such goods. Character as an import was the determining factor. As will be shown later, it was easy for the Court, thus minded, to pass over to Congress the responsibility for stating in definite terms at what point in an interstate movement specified articles of commerce lose their character as imports and become subject to state regulation.

The case of *Robbins v. Shelby County Taxing District* in 1887<sup>21</sup> marked an important development in the Court's attitude on the question of the power of the states to apply their laws to interstate commerce. This case brought into question the validity of a local license tax upon salesmen selling goods by sample. Notwithstanding the fact that in the *License Cases* and *Woodruff v. Parham* the Court had sustained nondiscriminatory state license tax laws even in reference to the sale of goods of extrastate origin, here the Court held the local tax invalid as an interference with interstate commerce. The Court might have merely held that the tax, though nondiscriminatory on its face, was in fact discriminatory, and thus have brought it within the principle followed in earlier tax cases. But Justice Bradley, who gave the majority opinion, took a more advanced position. While admitting that a state might tax imported goods as property *after* they had become a part of its general mass of property, provided there was no discrimination against them as imports, he insisted that the state might not tax the sale of

<sup>20</sup> *Brown v. Houston*, 114 U. S. 622, 634 (1885).

<sup>21</sup> 120 U. S. 489 (1887).

goods, or the offer to sell them, *before* they had actually been shipped into the state.<sup>22</sup> To do so would constitute the levying of a tax on interstate commerce itself, even though the sale of goods of local origin was also burdened in equal degree. The Court had held in the *Woodruff* case that a state might impose a license tax upon the selling of goods which were *physically within* the state. It now held that the state might not impose a license tax upon the sale of goods in interstate commerce when the sale contemplated an *interstate movement* of goods to complete the transaction. The fact of federal jurisdiction over the goods involved did not operate to defeat application of state laws in the one case, but it did in the other.

This ruling indicated that the Court, despite the protests of a minority,<sup>23</sup> was broadening its conception of the commerce clause as a barrier to state taxation and regulatory measures in the interstate sphere. Soon after this case was decided the federal commerce power was applied by the Supreme Court to override a state's regulation governing the sale of intoxicating liquors. The outcome was a test of the authority of Congress to release state powers held in check by its own paramount authority over interstate commerce. By fixing the point at which incorporation of goods into the mass of property in the state and consequent loss of character as an import should be deemed to occur, Congress effected an extension of state power beyond the limits set by the Supreme Court.

#### B. THE "SILENCE-OF-CONGRESS" DOCTRINE

In the *Robbins* case Justice Bradley attempted to make a summary of the principles which the Court had advanced in previous cases touching the question of the limits of state power under the

<sup>22</sup> *Ibid.*, p. 497. "Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state."

The view expressed here by Justice Bradley was a restatement of the position taken by him in his concurring opinion in *Ward v. Maryland*, 12 Wall. 418, 432 (U. S.) (1871), wherein the majority opinion had held a local license tax operating upon out-of-state sellers invalid under the guarantee of privileges and immunities in the Fourteenth Amendment.

<sup>23</sup> There was a strong dissenting opinion in the *Robbins* case by Chief Justice Waite, with Field and Gray, JJ., concurring. The position taken by the minority was that the principle of the *Woodruff* case was controlling.

commerce clause. In so doing the following language was employed:

Certain principles have already been established by the decisions of this court . . . Among those principles are the following:—

1. The Constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations, but among the several States, *that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system, or plan of regulation . . .*

2. Another established doctrine of this court is, that where the power of Congress to regulate is exclusive, *the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions*; and any regulation of the subject by the States, except in matters of local concern only, as hereafter mentioned, is repugnant to such freedom . . .<sup>24</sup>

Analysis of this statement discloses two separate propositions being advanced on the point of the nature of the inhibition upon state power in the regulation of commerce. The language in the first paragraph indicated that, in that field where only Congress might legislate the obstacle to the exercise of state power was the conveyance of control over the subject to Congress by the Constitution. Regulation by the states was forbidden because the subject matter was such as to admit of control only by a single legislative authority, i.e. Congress. The second paragraph, on the other hand, indicated that the inhibitory force lay in the “will” of Congress that the subject should be free from any restriction or regulation by the states. The distinction between these two points of view was fundamental. The first implied that the question of the limits of state power under the commerce clause was one of competence *under the Constitution*. State power was limited by jurisdictional considerations, to be judicially discovered and applied. In the light of the second statement the question of the limits of state power over commerce became one of competence *under Congressional acts*. The final determination of the boundaries of state power under the commerce clause was in the hands of Congress, and the function of the judiciary was the interpretation of Congressional will in this regard. The first statement was in harmony with the exclusive-power concept of federal and state relationships

<sup>24</sup> *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 492 (1887). Italics mine.

in the regulation of commerce; the second fitted in with the concurrent-powers theory.

The endorsement in this instance of both these propositions by the Court may be accounted for by reference to prior opinions which had leaned toward the one or the other of these basic theories. In the decades immediately following the Civil War, in conformity with strongly nationalistic trends of thought in that period generally, the tendency of the Court to apply the federal commerce power as a limitation upon state authority became pronounced. As a rule, when invalidating state laws on the ground of conflict with an exclusive power in Congress to regulate commerce, the Court reached its conclusions by finding an absolute lack of authority in the states to deal with the matters in question, by reason of either the nature of the subject dealt with or the nature of the power sought to be exercised. Thus in the first case in which a state law was overthrown solely on the ground of exclusiveness of the federal power over commerce the invalidity was held to arise from "a conflict with the Constitution of the United States," because the subject was "of such nature as to require exclusive legislation by Congress."<sup>25</sup> Similar language is found in many other decisions of this period.<sup>26</sup>

On the other hand, there was equal authority in previous pronouncements of the Court supporting the statement in *Robbins v. Shelby County Taxing District* that the "will of Congress" as manifested in its silence, rather than the grant of exclusive power to it by the Constitution, was the limiting factor. Foreshadowings of this theory were to be seen in some of the earliest opinions of the Supreme Court holding state legislation to be invalid because of conflict with Congressional acts. In a sense, the silence-of-Congress doctrine of later theory may be regarded as simply an extension of the conditionally-exclusive-power theory, given actual application in *Gibbons v. Ogden* in 1824. The conception of a Congress "willing" that commerce should be free by its failure to act was suggested both in the opinion of the Court<sup>27</sup> and in the concurring

<sup>25</sup> *The State Freight Tax Case*, 15 Wall. 232, 279, 280 (U. S.) (1873).

<sup>26</sup> *Morgan v. Parham*, 16 Wall. 471 (U. S.) (1873); *Henderson v. Mayor of New York*, 92 U. S. 259, 271 (1876); *Foster v. Master and Wardens of the Port of New Orleans*, 94 U. S. 246 (1877); *Guy v. Baltimore*, 100 U. S. 434, 439 (1880); see also the concurring opinion of Clifford, J., and Waite, Ch. J., in *Crandall v. Nevada*, 6 Wall. 35 (U. S.) (1867).

<sup>27</sup> 9 Wheat. 1, 209 (U. S.) (1824). Here the Chief Justice approved the view

opinion of Justice Johnson<sup>28</sup> in that case. The concurring opinions of two members of the Court in 1849 gave expression to the idea very clearly in the *Passenger Cases*.<sup>29</sup>

A negation arising by implication from the silence of Congress was first clearly relied upon by the Court in justifying invalidation of a state statute in the case of *Welton v. Missouri*.<sup>30</sup> Justice Field, speaking for the Court, declared:

The fact that Congress has not seen fit to prescribe any specific rules to govern inter-State commerce does not affect the question. *Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that inter-State commerce shall be free and untrammelled.* As the main object of that commerce is the sale and exchange of commodities, the policy thus established would be defeated by discriminatory legislation like that of Missouri.<sup>31</sup>

In succeeding cases this doctrine came into increasing favor with the Court.<sup>32</sup> As indicated by the excerpt from the *Robbins* case, it had become by 1887 an accepted element in the constitutional theory of the commerce power.<sup>33</sup>

that "what the regulating power designs to leave untouched" is as much a part of regulation as "that on which it has operated"

<sup>28</sup> *Ibid.*, p. 228. "Of all the endless variety of branches of foreign commerce, now carried on to every quarter of the world, I know no one that is permitted by act of Congress, any otherwise than by not being forbidden"

<sup>29</sup> 7 How. 283 (U. S.) (1849). Justice Grier stated as one of the bases for his findings against the validity of the state acts in question (p. 464): "Congress has regulated commerce and intercourse with foreign nations and between the several states, by *willing that it shall be free*, and it is therefore not left to the discretion of each State in the Union either to refuse a right of passage to persons or property through her territory, or to exact a duty for permission to exercise it." (*Italics mine.*)

Justice McLean declared (pp. 399-400): "It has been well remarked that the regulation of commerce consists as much in negative as in positive action. . . Is a commercial regulation open to state action because the Federal power has not been exhausted? No ingenuity can provide for every contingency; and if it could it might not be wise to do so. . . When this state power is exercised, how can it be known that the identical thing has not been duly considered by Congress?"

<sup>30</sup> 91 U. S. 275 (1876).

<sup>31</sup> *Ibid.*, p. 282. *Italics mine.*

<sup>32</sup> It was stated with approval by the Court in *Hall v. DeCuir*, 95 U. S. 485, 490 (1878); *County of Mobile v. Kimball*, 102 U. S. 691, 697 (1881), *Escanaba, etc., Co. v. Chicago*, 107 U. S. 678, 687 (1882); *Brown v. Houston*, 114 U. S. 622, 630 (1885); *Walling v. Michigan*, 116 U. S. 446, 455 (1886).

<sup>33</sup> The evolution of the silence-of-Congress doctrine in judicial opinions is traced in Henry W. Biklé, "The Silence of Congress," 41 *Harvard Law Rev.* 200



What the Court had in mind in thus justifying its adverse holdings on the point of state power under the commerce clause by discovering a coincidence in the will of Congress and the result reached is not altogether clear. Its purpose may have been merely to divert attention from the fact that in invalidating state statutes on the ground of conflict with the commerce power the judicial branch was assuming an important measure of control over a considerable segment of state legislation in which Congress had a direct interest by reason of the power vested in it by the Constitution.<sup>34</sup> By this process of rationalization the "will of the Court" became translated into the "will of Congress."<sup>35</sup> Again, the Court might have considered the silence-of-Congress doctrine merely the extension to its uttermost limits of the earlier conditionally-exclusive-power rule. In this sense the reliance of the Court upon the will of Congress was an effort to seek consistency in judicial rulings and the will of Congress on the same point, so far as that could be determined from legislative action or inaction.<sup>36</sup> To the extent that the Court could discover the will of Congress from its positive acts, this explanation seems valid; but it fails to establish a basis for reliance upon the silence of Congress when there had been no declaration whatsoever by Congress to serve as a clew to the significance of its failure to act.

(Dec., 1927); John B. Sholley, "The Negative Implications of the Commerce Clause," 3 *University of Chicago Law Rev.* 556 (June, 1936), and Clarence G. Shenton, "Interstate Commerce during the Silence of Congress," 23 *Dickinson Law Rev.* 78, 107, 139 (Feb.-March, April-May, June-July, 1919).

<sup>34</sup> It should be observed that the Randolph Plan, when presented to the Constitutional Convention in 1787, proposed to vest in Congress a general power of veto over state legislation. In later discussions of the commerce-clause provision the idea of Congressional control over state laws was not lost sight of. See *supra*, pp. 10-15.

<sup>35</sup> This is suggested as a possible explanation by Sholley, *op. cit.*, p. 584.

<sup>36</sup> "It is self-evident that every decision the Court makes is in a very real sense the will of the Court. Yet it seems clear that in its invocation of the will of Congress, the Court is not merely drawing a red herring over the trail of the exercise of its free and untrammelled choice. . . . The problem is not identical with the ascertainment of the intent of Congress, as that phrase is commonly used in the construction of a given statute. Rather the Court is seeking consistency with the tendency manifested by the relevant action of Congress. Thus it seems fair to say the Court seeks consistency with the policy apparent in federal legislation, so far as the Court can ascertain that policy. The Court has to guess, and in guessing it is likely to conceive that its wisdom coincides with the wisdom of Congress. Where no relevant policy can be perceived, the will of Congress is non-existent." F. D. G. Ribble, *State and National Power over Commerce* (1937), p. 212.

It is doubtful whether the Court foresaw the logical end to which this shifting of the basis of its holdings on the invalidity of state legislation would lead. Simplicity of rule in expounding the commerce clause as a constitutional limitation upon state powers was rendered more remote by the introduction of this new limitative concept. The local-concurrent-powers doctrine of *Cooley v. Board of Wardens*, with its more or less arbitrary division of the subject matters under the commerce power into two classes, had introduced a new element of uncertainty as to the scope of state powers in reference to commercial matters. Now, in putting forward this doctrine of silence the Court increased the possibility of confusion. Positive action by Congress would prevent all state legislation in conflict therewith in either the exclusive- or the concurrent-powers fields; but Congressional silence would forbid action by the states in the one and permit it in the other. While the legal fiction that state power is inhibited by Congressional silence might conceivably serve a useful purpose in some cases, the Court was approaching close to legalistic casuistry in assuming that it might probe the Congressional mind and find the legislative "will" expressed in the silence of Congress, when the Court was itself the arbiter on whether the result of that silence would be to permit or to deny state action. The outcome would actually turn upon the Court's view of the susceptibility of the subject to a non-uniform system of regulation.<sup>37</sup>

Implicit in this new rationalization was the question of whether

<sup>37</sup> James B. Thayer, *Cases on Constitutional Law* (1895), II, 2191, note: "If, then, the courts would know, in any given case of a regulation of commerce, what the silence of Congress means, how are they to tell, unless they first determine under which head the given regulation belongs, that of regulations requiring a uniform rule, or of those which do not? But that, as we have seen, they cannot settle without passing on a legislative question, except in cases so clear that there cannot reasonably be two opinions."

Other critics have also pointed out the fallacy in relying upon the silence of Congress to bolster judicial findings on the question of state power. Gavit, *op. cit.*, 186-187, says of it: "The suggestion that the state action is either constitutional or unconstitutional depending upon an imperceptible quality in the 'silence of Congress' is the most facetious argument to which the Supreme Court has ever stooped. Congress by its action cannot enlarge or interpret the Constitution. Certainly its silence has no greater efficacy."

Sholley, *op. cit.*, p. 588, observes: "The 'psycho-analysis' of Congress is a perilous venture when that body speaks and is a hopeless task when it is silent. It would seem that the only sensible course is to hold that when Congress says nothing it means what it says."

Congress might break its silence to permit an extension of state authority over a matter held by the Court to be "national" in character, and hence beyond the reach of state power. If this might be done then Congress would be placed in a position where it shared with the Court power to delimit the sphere of state action under the Constitution. Congress might even nullify a decision of the Court on this point where the ground for invalidity was conflict with the exclusive, but unexercised, power of Congress. But this implies that if the line in one instance might be determined by legislative action, overruling a judicial pronouncement on the issue, it should be so determinable in all instances. If in one instance susceptibility to diversity of treatment is a legislative rather than a judicial question, it should be so in all instances. This would point to a most sparing use by the Court of the power to invalidate state legislation on the ground of conflict with the exclusive, but unexercised, power of Congress.<sup>88</sup> For the Court to do otherwise would expose it to criticism for having assumed power to "regulate" commerce by prohibiting state action, a power which the Court would be the first to deny that it might assume.

There was no suggestion in the earlier cases setting forth the doctrine of Congressional silence that the Court foresaw fully all the implications in this theory. It gave no indication that it was preparing the way for an abdication of authority, in part at least, to expound the Constitution on the limits of state power in regulating commerce. In *Cooley v. Board of Wardens* the Court had

<sup>88</sup> Thayer, *loc. cit.*, emphasized this point in the following language:

"... Now the question whether or not a given subject admits of only one uniform system or plan of regulation is primarily a legislative question, not a judicial one. For it involves a consideration of what, on practical grounds, is expedient, possible, or desirable; and whether, being so at one time or place, it is so at another.... It is not in the language itself of the commerce clause of the Constitution now in question, or in any necessary construction of it, that any requirement of uniformity is found, in any case whatever. That can only be declared necessary, in any given case, as being the determination of some one's practical judgment. The question, then, appears to be a legislative one, it is for Congress and not for the courts,—except, indeed, in the sense that the courts may control a legislative decision, so far as to keep it within the bounds of reason, of rational opinion.

"... It would seem to follow that the courts should abstain from interference, except in cases so clear that the legislature can not legitimately supersede its determinations; for the fact that the legislature may do this, in any given case, shows plainly that the question is legislative and not judicial."

taken cognizance of Congressional legislation as a "clear and authoritative" declaration that the subject matter there involved, the regulation of pilotage, was one of local concern.<sup>39</sup> But the Court relied chiefly upon its own judgment that the subject was one upon which the states might legislate in their own right, without reference to the Congressional act.<sup>40</sup> The language employed in other cases in which state power was held to be limited by the exclusive power of Congress over the subject conveyed clearly the impression that the conclusion of the Court was final on the point, and that for the subjects involved, only legislation by Congress was permissible. While relying upon the silence of Congress as an inhibitory force, the Court apparently regarded the lack of power in the states to act as a matter of constitutional disability. Thus in *Hall v. DeCuir* the conclusion was that, "if the public good requires such legislation, it must come from Congress and not from the states";<sup>41</sup> and in *County of Mobile v. Kimball*, that, "where the subjects of regulation are national in character and admit and require uniformity of regulation," there could be "only one system or plan of regulations," which "Congress alone" might prescribe.<sup>42</sup>

This would seem to have supplied the answer to the question of the location of authority to act upon matters lying in the field covered by the exclusive power of Congress. If a subject was such as to require the exclusion of state action upon it, the national authority alone might deal with it. These pronouncements of the Court came, however, only a short time before it was required to reconsider the question of the limits of state power to regulate interstate traffic in intoxicating liquors. In cases raising this question the Court correctly anticipated a strong public reaction to its restriction of state authority to deal with original-package sales of

<sup>39</sup> 12 How. 299, 319 (U S) (1851).

<sup>40</sup> *Ibid.*, pp 319-320: "Whatever subjects of this commerce power are in their nature national, or admit of only one uniform system, or plan of regulation, may justly be said to be of such nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots, is plain.... The nature of the subject when examined, is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants."

<sup>41</sup> 95 U. S. 485, 490 (1878).

<sup>42</sup> 102 U. S. 691, 697 (1881). See also *Escanaba, etc., Co. v. Chicago*, 107 U. S. 678, 687 (1882); and *The State Freight Tax Case*, 15 Wall. 232, 280 (U. S.) (1873).

liquors. It therefore adopted the course of passing over to Congress the responsibility for continuance of a situation wherein the federal commerce power was a bar to effective state action. When Congress acted to remove the disability of the states the silence-of-Congress doctrine, applied in conjunction with the original-package rule, afforded the Court an avenue over which to beat a retreat from a politically untenable position.

## 2. STATE POWER TO CONTROL TRAFFIC IN INTOXICATING LIQUORS PRIOR TO 1890

THE question of the validity of state liquor legislation under the commerce clause was first presented to the Supreme Court in the *License Cases*, in 1847. The result has already been described.<sup>43</sup> After the Civil War greater success on the part of temperance groups in bringing about the enactment of state legislation regulating the liquor traffic and taxing the manufacture and sale of intoxicants eventually brought the question again before the Court.

Advocates of state regulation were at first generally successful in winning judicial recognition of the validity of their measures in the face of objections raised on various grounds.<sup>44</sup> But in these cases the Court carefully refrained from committing itself on the question whether a state, by such legislation, was exceeding its powers under the commerce clause if the effect was to prevent the exportation of goods of this character or their introduction into the state from other states.<sup>45</sup> Since the elaboration of the commerce clause in the direction of limiting state power had been

<sup>43</sup> *Supra*, p. 55

<sup>44</sup> State regulation of the liquor traffic was upheld against the contentions (1) that the payment of a federal internal-revenue license tax granted immunity from state restrictions in the manufacture and sale of intoxicants, *McGuire v. Massachusetts*, 3 Wall. 387 (U. S.) (1865), *The License Tax Cases*, 5 Wall. 462 (U. S.) (1866), *Puryear v. Massachusetts*, 5 Wall. 475 (U. S.) (1866); (2) that such laws contravened the guarantee of privileges and immunities in the Fourteenth Amendment, *Barthemeyer v. Iowa*, 18 Wall. 129 (U. S.) (1873); (3) that they violated the contracts clause of the Constitution, *Beer Co. v. Massachusetts*, 97 U. S. 25 (1877); and (4) that they violated the guarantee of due process in the Fourteenth Amendment, *Mugler v. Kansas*, 123 U. S. 623 (1887), and *Kansas v. Ziebold*, *ibid.* In *Foster v. Kansas*, 112 U. S. 201, 206 (1884), the Supreme Court declared that the question of the constitutional power of a state to prohibit the manufacture and sale of intoxicating liquors was "no longer open" before the Court.

<sup>45</sup> See comments of the Court in *Mugler v. Kansas*, 123 U. S. 623, 674, 676 (1887). Justice Field's concurring opinion in this case quite clearly intimated

carried forward to considerable length by 1887, the possibilities of establishing a restriction upon state authority through this channel did not long remain unexplored.<sup>46</sup>

In 1886 the legislature of Iowa, in an attempt to strengthen the state's prohibition laws, provided that no common carrier should deliver intoxicating liquors in the state if consigned to persons not authorized by proper local authorities to receive them. In compliance with this enactment agents of the Chicago and Northwestern Railway Company refused to accept a shipment of 5,000 barrels of beer at Chicago for delivery to a point in Iowa. The reason given for refusing the shipment was that it was consigned to an Iowa dealer unauthorized by local law to receive it. A suit for damages was instituted by the consignee against the company, which set up the prohibitory state statute as its defense. Since the plaintiff contended this statute was void as an invasion of the power of Congress to regulate commerce, the issue turned upon this question. The district court, holding the state statute valid, dismissed the suit. The issue was carried to the Supreme Court.

Through an opinion rendered by Justice Matthews the Supreme Court held the state statute invalid as a "regulation of that character which constitutes an unauthorized interference with the power given to Congress over the subject."<sup>47</sup> Although in one of the

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that the Court, if given an opportunity to reconsider this issue, would reach a conclusion quite different from that of the *License Cases* in 1847.

<sup>46</sup> As a matter of fact in two cases prior to 1887 the Court had held void under the commerce clause state regulations which operated in a discriminatory manner against interstate commerce in intoxicating liquors. In *Tiernan v. Rinker*, 102 U. S. 123 (1880), a Texas statute levying a license tax upon vendors of liquors, but exempting from its provisions dealers in wines and beer of local manufacture, was held inoperative with regard to the exemption feature. In *Walling v. Michigan*, 116 U. S. 446 (1886), a state tax imposed upon persons engaged in selling or soliciting sales of liquors to be shipped from other states, but not required of those whose concerns had their principal place of business in the state, was likewise held invalid as a discrimination against interstate commerce. The principle of these cases was followed in *McCreary v. State*, 73 Ala. 480 (1883), and *Weil v. Calhoun* (Cir. Ct.), 25 F. 865 (1885). These holdings did not involve a new principle, however, since invalidation of state taxes which discriminated against interstate commerce had occurred in previous cases, beginning with *Welton v. Missouri*, 91 U. S. 275 (1876). In *Low v. Austin*, 13 Wall. 29 (U. S.) (1871), the Court had held that a state might not tax imported wine in the original package so long as it remained in the possession of the importer.

<sup>47</sup> *Bowman v. Chicago and Northwestern Ry. Co.*, 125 U. S. 465, 498 (1888).

*License Cases*<sup>48</sup> the Court had held a local license law applicable in the sale of an interstate shipment of liquor in the original package, the ruling in that case was not regarded as controlling, since it had not involved the question of the power of a state to prohibit directly the importation of liquor from another state. The Court thus avoided a direct reversal of the earlier ruling, although there would seem to have been some inconsistency in admitting that a state might accomplish by its taxing power what it could not accomplish by direct regulation.<sup>49</sup>

The state act was declared not to be permissible as a regulation of commerce falling within the local-concurrent-powers sphere. Nor was it an inspection law, quarantine law, or any other type of legislative act which might be sustained under the police power of the state.<sup>50</sup> It was a "regulation of commerce" having the effect of giving a sanction to the laws of Iowa upon persons and property outside its boundaries.<sup>51</sup>

The Court left no doubt that the prohibition upon state action arose from the fact that Congress had "willed" that commerce in liquors should be free of such restraints. It was pointed out that Congress had legislated on the subject of interstate commerce by authorizing all steam railroads to carry goods from state to state and to receive compensation therefor.<sup>52</sup> This the Court found to be an indication of the intent of Congress that the transportation

<sup>48</sup> *Peirce v. New Hampshire*, 5 How. 504 (U. S.) (1847).

<sup>49</sup> This was pointed out by Justice Field in a concurring opinion. He insisted that there be a frank recognition of the implication that the subjects of interstate commerce were as fully protected against state power while in the original package as were foreign imports. This would have amounted to an extension of the doctrine of *Brown v. Maryland* to interstate shipments in a complete sense, a position which the majority found unnecessary to assume as yet.

<sup>50</sup> In a dissenting opinion Justice Harlan, who had written the opinion of the Court in *Mugler v. Kansas* the previous year, took the position that the act was a necessary and proper measure for the effective enforcement of a policy of prohibition or regulation under the police power. Chief Justice Waite and Justice Gray concurred. Examples of interference with interstate and foreign commerce through application of concededly valid state health and public-safety laws were cited as controlling the matter under consideration. The minority opinion pointed out that the ruling of the Court would provide a means by which the entire system of state regulation of the liquor traffic could be defeated through legalization of importations in defiance of state law.

<sup>51</sup> 125 U. S. 465, 486, 498.

<sup>52</sup> R. S., sec. 5258 (1878). This section was originally enacted as a part of the Act of June 15, 1866, 14 Stat. 66.

of commodities between the states should be free.<sup>53</sup> But whether or not the legislation of Iowa contravened any positive acts of Congress, it was in violation of "that liberty of trade which Congress ordains as the national policy, by willing that it shall be free from restrictive regulations."<sup>54</sup> Excerpts were quoted with approval from previous opinions in which the silence of Congress upon regulation of matters of national concern was held to prevent state action.<sup>55</sup>

But the Court was apparently willing to concede that in this instance it might have interpreted erroneously the silence of Congress. A vague suggestion was made that Congress might break its silence and thus permit state action upon matters which would otherwise lie beyond state authority. The idea was apparently in the formative stage, and it was being offered tentatively rather than conclusively; but in the light of later developments it appears that the Court was surveying in advance a possible line of retreat. After a review of cases tracing the limits of state police power in reference to the conduct of interstate and foreign commerce the Court concluded with the significant statement that in any case "it [the state] cannot, *without the consent of Congress, express or implied*, regulate commerce between its people and those of other States of the Union in order to effect its end, however desirable such a regulation might be."<sup>56</sup> A state's police power, in its own right, might not extend to a determination of what should or should not be admissible articles of interstate commerce, since this was a power falling within the range of exclusive federal authority.

The hint of a possible solution of the problem through federal legislation came at a peculiarly inopportune moment. Upon the day preceding the announcement of this opinion the Senate Judiciary Committee made a report upon a bill proposing to extend state power over imported liquors while in the original package. It was therein found that the definition of the limits of state power over such shipments was a *judicial* function.<sup>57</sup> Evidently the issue was one for the settlement of which both the judicial and the

<sup>53</sup> 125 U. S. 465, 494-495.

<sup>54</sup> *Ibid.*, p. 498.

<sup>55</sup> *Ibid.*, pp. 485, 486, 487, quoting from *County of Mobile v. Kimball*, 102 U. S. 691, 697 (1881), and *Hall v. DeCuir*, 95 U. S. 485, 490 (1878).

<sup>56</sup> 125 U. S. 465, 493. *Italics mine.*

<sup>57</sup> See *infra*, p. 82



legislative departments of the national government were desirous of escaping responsibility. Since by constitutional arrangements the judiciary was in a position to have the last word on the matter, it was able eventually to force Congress to act.

The reasoning of the Court in this case was carried to its ultimate conclusion the following year in *Leisy v. Hardin*. An Iowa statute, which was enacted in 1888, required permits for the manufacture or sale of liquor in the state. Leisy and Company, an Illinois brewing concern, sent a shipment of beer to Keokuk, Iowa. It was there offered for sale in the original packages by their agent, who had not complied with the Iowa law relative to possession of a permit. The beer was seized by Iowa authorities at the shipping destination, and a suit was instituted to recover possession by the agent of the brewery. His contention that the state statute was void, so far as it was applied to restrict the right of sale of original-package goods in interstate commerce, was held to be without merit by the Iowa Supreme Court.<sup>58</sup>

The United States Supreme Court, with three members again in dissent, reversed the state court.<sup>59</sup> Chief Justice Fuller, giving the opinion, left no doubt that the original-package doctrine of *Brown v. Maryland* was applicable to interstate shipments, and that the state act was an interference with federal power over such shipments. A right of sale in the original package was held to be derived from an implied Congressional authorization of interstate commerce in goods of this character. The ruling of the Court was therefore an adoption of the views set forth by Justice Field by way of *dictum* in his concurring opinion in the *Bowman* case,<sup>60</sup> and, as the Court admitted, overruled *Peirce v. New Hampshire*.<sup>61</sup>

Again the Court, as in the *Bowman* case, based the prohibition

<sup>58</sup> *Leisy and Co. v. Hardin*, 78 Iowa 286, 43 N. W. 188 (1889). The same point had been ruled upon previously by the Iowa Supreme Court in *Collins v. Hills*, 77 Iowa 181, 41 N. W. 571 (1889), and *Grusendorf v. Howat*, 77 Iowa 187, 41 N. W. 571 (1889). The state law was sustained mainly on the authority of *The License Cases*, 5 How. 509 (U. S.) (1847); see *supra*, p. 55.

<sup>59</sup> *Leisy and Co. v. Hardin*, 135 U. S. 100 (1890). It should be noted that prior to this decision a substantial victory was gained by the advocates of state control of the liquor traffic when in *Kidd v. Pearson*, 128 U. S. 1 (1888), the Court held unanimously that the police power of a state extended to the prohibition of manufacture of intoxicating liquors, even if the product was intended for shipment outside the state.

<sup>60</sup> See *supra*, p. 70, note 49.

<sup>61</sup> See *supra*, p. 55, note 12.

of state action upon a conflict with the will of Congress as implied in its silence.<sup>62</sup> But in language even more unmistakable than that in the previous case the Court made clear its view that, with the consent of Congress, the states might be permitted to regulate interstate commerce in intoxicating liquors to the extent of forbidding introduction and sale of such goods in the original package. At no fewer than six points in the opinion the Court invited Congress to accept the responsibility of defining the limits of state power over interstate liquor shipments.<sup>63</sup>

<sup>62</sup> 135 U. S. 100, 109: "When, however, a particular power of the general government is one that must be necessarily exercised by it, and Congress remains silent, this is not only not a concession that the powers reserved by the States may be exerted as if the specific power had not been elsewhere reposed, but, on the contrary the only legitimate conclusion is that the general government intended that power should not be affirmatively exercised, and the action of the States cannot be permitted to effect that which would be incompatible with such intention."

<sup>63</sup> *Ibid.*, at p. 108, the Court declared: "A subject matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the State, *unless placed there by congressional action*" (Italics mine here and in remainder of this note)

At p. 109: "Hence, inasmuch as interstate commerce, consisting in the transportation, purchase, sale, and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or *allowing the States to do so*, it thereby indicates its will that such commerce shall be free and untrammelled."

At p. 119: "The conclusion follows that, as the grant of the power to regulate commerce among the States so far as one system is required, is exclusive, the States cannot exercise that power *without the assent of Congress*, and in the absence of legislation, it is left for the courts to determine when state action does or does not amount to such exercise, or in other words, what is or is not a regulation of commerce."

At pp. 123-124: "... but notwithstanding Congress is not vested with supervisory power over matters of local administration, *the responsibility is upon Congress, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the State in dealing with imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action.*"

At p. 124: "Up to that point of time, we hold that *in the absence of congressional permission to do so*, the State had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or non-resident importer."

At p. 125: "To concede to a State the power to exclude, directly or indirectly, articles so situated, *without congressional permission*, is to concede to a majority of the people of a State, represented in the State legislature, the power to regulate commercial intercourse between the States, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in Congress."

An apparent inconsistency in the language of the Court is evident on the face of these statements. If a subject matter has been found by the Court to be "confided exclusively to Congress," and if it "must be governed by a uniform system," it would seem that no action by Congress could change the situation. A subject matter not falling in the range of concurrent state power for the reasons stated by the Court could hardly be regarded as falling within that range by reason of a Congressional declaration to that effect. In *Cooley v. Board of Wardens* the Court had said:

If the States were divested of the power to legislate on this subject [pilotage] by the grant of the commerce power to Congress, it is plain this act could not confer power upon them thus to legislate. If the Constitution excluded the states from making any law regulating commerce, certainly Congress cannot regrant, or in any manner reconvey to the States that power.<sup>64</sup>

Yet here the Court was apparently opening the way for conveyance to the states of power denied them by reason of the national character of the subject under consideration. The inability of the states to act was taken from the realm of *judicial* and *constitutional* questions and placed in the category of *legislative* and, therefore, *political* questions.

It has been suggested that the *dicta* of the *Leisy* opinion, when surveyed in the light of the statement quoted above from the *Cooley* case, can be explained as an attempt to redefine the term "exclusive" as used in the earlier case to mean "concurrent," but with a presumption against state action in the face of Congressional silence.<sup>65</sup> Only on the basis of such a rationalization as this would

<sup>64</sup> 12 How. 299, 318 (U. S.) (1851).

<sup>65</sup> J. A. C. Grant, "State Power to Prohibit Interstate Commerce," 26 *California Law Rev.* 34 (Nov., 1937). The author concludes that, if his analysis is correct, then the Court in the *Leisy* opinion "annihilated the *Cooley* rule as a doctrine of constitutional law and remade it into a test of legislative intent"; and that "it left no constitutional barrier to prevent Congress, by breaking its silence—or the Court, by refusing to draw a negative presumption therefrom—from giving free rein to state laws prohibiting the importation or sale of articles which the respective states consider undesirable" (p. 59).

This statement is rather too sweeping. The Court might find that only a part of the exclusive power of Congress is "presumptively" exclusive and that the rest is "exclusively" exclusive. The Court invented a formula out of whole cloth in *Cooley v. Board of Wardens* when it enunciated the local-concurrent-powers doctrine. It might as easily discover a rule for distinguishing between those subject matters falling within the exclusive-power range which Congress,

it be possible for the Court to permit its own holding on the limits of state authority to be overruled by a Congressional act. But this amounts to a concession that the so-called "exclusive" power of Congress in regulating commerce, or a part of it at least, is in reality only a paramount power. However this may be, the point recognized by these *dicta* was that the Court assumed an authority to prevent state interferences with commerce, subject to a reversal by Congress of its finding on the undesirability of a given form of state regulation.

The dissenting opinion in the case offered by Justice Gray and concurred in by Justices Harlan and Brewer commands unusual interest. Later, when remedial legislation was being considered in Congress, it was maintained by many that the minority opinion represented a much sounder view on the question at issue. Justice Gray restated in large part the views of the dissenting minority in the *Bowman* case. The position taken by the minority was that a full and free exercise of the acknowledged power of a state to protect the health and morals of its citizens involved the right to prevent all traffic not expressly sanctioned by federal law in a commodity such as intoxicating liquors. The presumption that interstate shipments of liquors were protected by the federal commerce power under the original-package rule of *Brown v. Maryland* was questioned, in view of the absence of positive Congressional acts supporting this conclusion. The ruling in the *License Cases* was asserted to be controlling on this point. Criticism was made of the Court's action in applying the silence of Congress as a restriction upon legitimate state action under the police power. In the view of the minority, if any significance at all should be attached to the will of Congress, its failure to overthrow the principle of the *License Cases* over a forty-year period should be interpreted as a tacit acceptance of a situation under which state liquor-traffic laws might be applied to interstate sales, rather than the contrary.<sup>66</sup>

From the standpoint of consistency in the development of the theory of the commerce power, it was perhaps unfortunate that the views of the minority did not prevail in this and the *Bowman* case. The general adoption of restrictive legislation by the states in

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by breaking its silence, may submit to state control and those which it may not. Cf. *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149 (1920), and *Washington v. Dawson and Co.*, 264 U. S. 219 (1924), *infra*, pp. 367-371.

<sup>66</sup> 135 U. S. 100, 160.

reference to the liquor traffic might well have been taken into account by the Court in permitting the state police power to apply in its own right to such commerce, so long as no discrimination against interstate commerce was shown. Considering the special status that this traffic was rapidly coming to occupy, the Court could have sustained such state interference with interstate commerce without doing violence to the theory of exclusiveness of the commerce power which it had developed up to that time. Equally direct interferences had been sustained in reference to state quarantine regulations and inspection laws.<sup>67</sup> Such a solution would have made unnecessary the legal contortionism to which the Court was later compelled to resort in justifying Congressional "recall" of its decision, while still insisting on adherence to the traditional division of authority between Congress and the states in the regulation of commerce.

The Court failed to distinguish between an interference imposed for the purpose of commercial advantage and one imposed for the protection of public health and morals. The exclusive-power theory, properly applied, permits such a distinction.<sup>68</sup> The Court ascribed to the commerce clause a greater protective force against state regulation than that which it had previously ascribed to the guarantees of due process and of privileges and immunities in the Fourteenth Amendment.<sup>69</sup> To have sustained the state act

<sup>67</sup> State interference with interstate and foreign commerce in the enforcement of quarantine regulations had been upheld in *dicta* of the Court in *Gibbons v. Ogden*, 9 Wheat. 1, 204 (U. S.) (1824); *Brown v. Maryland*, 12 Wheat. 419, 443 (U. S.) (1827); *New York v. Miln*, 11 Pet. 102, 142 (U. S.) (1837); and *The Passenger Cases*, 7 How. 283, 406 (1849); and was directly sustained in *Morgan's, etc., S. S. Co. v. Louisiana State Board of Health*, 118 U. S. 455 (1886). State inspection laws were upheld against the contention of interference with interstate commerce in *Turner v. Maryland*, 107 U. S. 38 (1882).

<sup>68</sup> "They [the Court] erred because in their perusal of history and of the decisions of the past they failed to distinguish between checks or interferences with the freedom of interstate commerce which were imposed for the mere purpose of raising revenue or the protection of a local trade monopoly and those which were imposed for protection of health and morals. They failed to distinguish between things commercial and things social and to realize that it is in the latter that the roots of the doctrine of home rule and local sovereignty are the most firmly embedded, and that no government can long endure which denies to its localities, in things social and moral at least, the 'inherent right of self-protection,' and the right in a large measure to judge of what is and what is not dangerous to its morals and its social life." A. A. Bruce, "The Wilson Act and the Constitution," 21 *Green Bag* 211, 213 (May, 1909).

<sup>69</sup> Gavit, *op. cit.*, sec. 37, p. 54.

as a proper exercise of police power would not have seriously weakened the general principle under which interstate commerce was kept free from burdensome state regulations having no clear relation to public morals, health, and safety. Such a liberal view of state powers might have made action by Congress to reinforce state authority in controlling the liquor traffic unnecessary.

While it was obvious that the Court was extending an invitation to Congress to assist in delimiting the sphere of state authority in controlling commerce in intoxicating liquors, the opinion was not entirely clear in suggesting the procedure that Congress should follow to achieve this end. Such guidance as the Court gave was offered in the following passage:

Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, *we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by state laws amounting to regulations, while they retain that character . . .* To concede to a State the power to exclude directly or indirectly, articles so situated, without congressional permission, is to concede to a majority of the people of a State, represented in the State legislature, *the power to regulate commercial intercourse between the States, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in Congress*, and its possession by the latter was considered essential to that more perfect Union which the Constitution was adopted to create.<sup>70</sup>

The approach suggested was legislation by Congress depriving intoxicating liquors of their character as legitimate commercial articles, thus allowing state laws to attach to them as to other articles falling within the range of state police power. This mode of action would avoid the embarrassing question of an unconstitutional delegation of power to the states, but it presented other difficulties. If a declaration by Congress that intoxicating liquors were no longer legitimate subjects of commerce was to be made, it would necessarily have to be a qualified denial. Not all states in their legislation regarded intoxicating liquors with equal hostility. Even the so-called "prohibition" states placed some forms of the liquor traffic on a legitimate basis. The general practice was to subject the traffic to certain restrictions, but not to ban it completely. The action which Congress took would therefore have to be a product of adjustment between the desires of the states

<sup>70</sup> *Leisy and Co v Hardin*, 135 U. S. 100, 124-125 (1889). Italics mine

having more stringent regulations and those imposing less stringent ones. The interests of those states which had an extensive export trade in liquors would be directly involved. The interstate traffic that remained legitimate under state laws would have to be assured of continued protection against discrimination. Through shipments would have to be given a right of way across a prohibition state. Rights and obligations of shippers and carriers would necessarily continue to be regulated in accordance with federal laws governing commercial transactions in legitimate articles.

In the midst of these difficulties it was not surprising, therefore, that Congress in its remedial legislation turned away from the course of action suggested by the Court. The resulting federal statute approached the problem by a legislative definition of the circumstances which should govern the loss of character as an import. By designating "arrival within the state" as the point of time at which state power might begin to operate upon liquors in interstate commerce the protective federal authority was withdrawn one stage. Congress thus regulated commerce in liquors by an act of "divestment," subjecting it partly to state control.

### 3. THE WILSON ACT

THE effects of the decisions in the *Bowman* and *Leisy* cases were felt immediately in those states which were attempting to prohibit or regulate strictly the liquor traffic. As was predicted in the minority opinions, shippers and consumers at once took advantage of the loophole offered in the rulings. So-called "original-package saloons" sprang up overnight. Unable to reach them with their regulations, the states were powerless to stem the flow of liquor across their borders. The whole system of state regulation of the liquor trade was endangered. Since there was little hope that the Court would reverse or modify its rulings, the temperance and prohibition elements, acting upon the broad hints in the opinions of the Court, took their complaints to Congress. The comparative alacrity with which that body responded was due in large measure to the fact that the emergence of the prohibition question was threatening to disrupt the major parties nationally. This was especially true of the Republican Party, in whose ranks most of the prohibitionists were found at that time.<sup>71</sup> Any expedient to

<sup>71</sup> Bruce, *op. cit.*, p. 211.

keep the matter within the realm of local politics was welcomed by the leaders of that party. They accordingly gave prompt attention to the pleas of the prohibitionists for action.

Precedents for legislation of the character sought from Congress were not wholly lacking. On previous occasions Congress had indicated by statute a willingness to sanction state regulation of matters connected with interstate and foreign commerce. Of such character was the act passed in 1789 authorizing the continuance in operation of state pilotage laws, although the subject was one within the range of the federal power over commerce.<sup>72</sup> Congressional acts in 1796 and 1799 granted consent by implication to the enforcement of state quarantine laws.<sup>73</sup> In 1866, in an effort to protect passengers in the California trade against the hazards of transportation upon vehicles or vessels in which explosives were being carried, an act was passed by Congress regulating the transportation of explosives. Section 5 of this act<sup>74</sup> provided that the preceding sections were not to be "so construed as to prevent any State, Territory, District, city or town . . . from regulating or prohibiting the traffic in or transportation of the said substances between persons and places lying or being within their respective territorial limits, or from prohibiting its introduction into such limits for sale, use or consumption therein."

These acts, however, related to matters over which state power had never been denied by the Supreme Court in construing the commerce clause.<sup>75</sup> They could be regarded merely as demonstrations of a disposition on the part of Congress not to permit its own action or failure to act to be interpreted as a prohibition upon the exercise of state police power.

More directly in point was the Act of August 31, 1852,<sup>76</sup> by

<sup>72</sup> The construction given this act is discussed *infra*, pp. 359 ff.

<sup>73</sup> See *infra*, pp. 347-350.

<sup>74</sup> Act of July 3, 1866, 14 Stat. 81

<sup>75</sup> As to pilotage, see the discussion of *Cooley v. Board of Wardens*, 12 How. 299 (U. S.) (1851), *supra*, p. 42. The inherent power of a state to protect its inhabitants against disease by the enactment of quarantine laws was recognized by Chief Justice Marshall in *dicta* in *Gibbons v. Ogden*, 9 Wheat. 1, 204 (U. S.) (1824), and was expressly sanctioned by the Court in *Morgan's, etc., S. S. Co. v. Louisiana State Board of Health*, 118 U. S. 455 (1886). The right of a state under the police power to regulate the transportation of explosives was recognized in *dicta* in *Brown v. Maryland*, 12 Wheat. 419, 443 (U. S.) (1827), and also in *New York v. Miln*, 11 Pet. 102, 142 (U. S.) (1837).

<sup>76</sup> 10 Stat. 112.



which Congress expressly sanctioned the construction of a bridge across the Ohio River at Wheeling, after the Supreme Court had declared invalid legislation of the state of Virginia authorizing such a structure.<sup>77</sup> The state act in this instance had been found void upon the ground of conflict with positive acts of Congress rather than with an unexercised federal power. Hence the Court found little difficulty in reversing its previous ruling on the point after Congress had in effect amended existing federal law on the subject.<sup>78</sup> Still another significant precedent was the Act of June 3, 1864,<sup>79</sup> subjecting national bank shares to nondiscriminatory state taxation, thus setting aside to a limited degree the immunity which this class of subjects enjoyed as a result of the principles enunciated by the Court in *McCulloch v. Maryland*.<sup>80</sup>

The immediate precursor of the Wilson Act, eventually adopted by Congress to restore to the states power over the interstate liquor traffic, was a provision of the Internal Revenue Act of July 1, 1862.<sup>81</sup> The provision specified that no federal licenses therein provided for should be construed to authorize the commencement or continuation of any trade, business, occupation, or employment falling under the license requirement contrary to state laws; or to prevent the states from imposing taxes upon the same subjects. This section of the revenue laws had been liberally construed by the Supreme Court. Federal license taxes upon manufacturers and dealers in intoxicating liquors had been held not to prevent states from taxing and regulating their activities.<sup>82</sup> The first proposals in Congress to enlarge or, rather, to refrain from restricting, the

<sup>77</sup> *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 13 How. 518 (U. S.) (1851).

<sup>78</sup> *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 18 How. 421 (U. S.) (1855). Ten years later the Court held valid, without express Congressional sanction, a municipal ordinance authorizing construction of a bridge across a navigable stream. *Gilman v. Philadelphia*, 3 Wall. 713 (U. S.) (1865). The Court found that the subject concerned was one upon which the states, in the absence of contrary federal legislation, were competent to act under their local-concurrent powers over commerce.

<sup>79</sup> 13 Stat. 99.

<sup>80</sup> 4 Wheat. 316 (U. S.) (1819). The 1864 statute was sustained by the Supreme Court in *Van Allen v. Board of Assessors*, 3 Wall. 573 (U. S.) (1866).

<sup>81</sup> 12 Stat. 459. The provision was continued in later revenue acts, appearing as section 3243 of the *Revised Statutes* of 1878.

<sup>82</sup> See *McGuire v. Massachusetts*, 3 Wall. 387 (U. S.) (1865), *The License Tax Cases*, 5 Wall. 462 (U. S.) (1867); *Purvear v. Massachusetts*, 5 Wall. 475 (U. S.) (1867).

authority of the states in enforcing their regulations upon the liquor trade were based upon this act.

These attempts began in Congress even before the decisions in the *Bowman* and *Leisy* cases. Under the rule laid down in *Brown v. Maryland* in 1827 a state might not levy taxes upon imported liquors while in the original package.<sup>83</sup> Payment of an import duty and compliance with other customs regulations also secured a right to importers to sell goods in the original package after entry, regardless of local laws of a prohibitory or restrictive character. In recognition of this construction of the tariff statutes the states had generally refrained from applying their restrictive liquor laws to imports in the original package while remaining in the hands of importers. Where this had not been provided by statute specifically state courts had given this construction to state regulations.<sup>84</sup> Since these statutory provisions and judicial constructions all proceeded upon the assumption that original-package imports were immune from state control by reason of the protection implied in federal tariff statutes, it was reasoned that a Congressional act denying this implication would remove the inhibition upon the exercise of state control, as it had in the field of internal-revenue legislation. Accordingly, a movement was launched in Congress in the 1880's for passage of an act applying the principle of the Revenue Act provisions of 1862 to the federal tariff upon liquors. The proposal was initiated by the delegation from Maine, a pioneer in the field of state prohibition.

The first bill introduced in Congress on the subject, by Representative Dingley, of Maine, on February 20, 1882, proposed "to subject the sale of imported alcoholic liquors to the operation of the same laws that control the sale of domestic liquors."<sup>85</sup> No

<sup>83</sup> *Low v. Austin*, 13 Wall 29 (U S) (1871).

<sup>84</sup> See *Bode v. State*, 7 Gill 326 (Md) (1848), *Commonwealth v. Clapp*, 71 Mass (5 Gray) 97 (1855); *Jones v. Hard*, 32 Vt. 481 (1860); *State v. Allmond*, 7 Del. (2 Houst.) 612 (1863), *City Council of Charleston v. Ahrens*, 28 S C (4 Strob.) 241 (1850); *State v. Robinson*, 49 Me 285 (1862); *State v. Amery*, 12 R. I. 64 (1878), *State v. Intoxicating Liquors*, 69 Me 524 (1879); *State v. Intoxicating Liquors*, 82 Me 558 (1890) In the brief of counsel in the last case named thirteen states were enumerated as making this exception in their liquor regulations. The only departure in the application of the rule was in the case of *State v. Blackwell*, 65 Me. 556 (1876). The state Supreme Court there held that a state statute prohibiting all sales of liquors was applicable to authorize the seizure of liquors in the hands of an importer if a clear intent to break the original package and violate the state law could be shown.

<sup>85</sup> H. R. 4521, 47th Cong., 1st Sess.

action upon it was taken by the Committee on Ways and Means, nor upon a similar bill introduced by Dingley in the Forty-ninth Congress. In the first session of the Fiftieth Congress committee attention was eventually given to a bill of this character introduced by Senator Frye, of Maine, on December 21, 1887. The Frye Bill provided:

That the consent of Congress is hereby given that the laws of the several States relating to the sale of distilled and fermented liquors, within the limits of each State, may apply to such liquors when they have been imported in the same manner as when they have been manufactured in the United States.<sup>86</sup>

The bill was referred originally to the Finance Committee. Owing to the constitutional issues involved the proposal was recommitted to the Judiciary Committee. On March 18, 1888, that committee, by a five-to-four vote, gave an unfavorable report, condemning it on constitutional grounds.<sup>87</sup>

The majority of the Judiciary Committee took the position that any relaxation of the tariff laws in the manner proposed would be unconstitutional as a delegation to the states of the exclusive federal power to regulate commerce.<sup>88</sup> It was also condemned as an attempted authorization of a nonuniform taxation and regulation

<sup>86</sup> S. 1067, *Cong. Rec.*, 50th Cong., 1st Sess., p. 142. In the same session two bills of the same general character were introduced in the House, H. R. 1489 and H. R. 8364, by Representative Dingley. They were not reported out of committee.

<sup>87</sup> *S. Rept.* 610, 50th Cong., 1st Sess.

<sup>88</sup> *Ibid.*, pp. 2-3: "It has been seen that an imported article remains a part of foreign commerce so long as it remains in the hands of the importer in the same shape and form in which it was imported. A prohibition or restriction on its sale, whilst thus conditioned, made by state authority, would therefore be a regulation of foreign commerce by the state, and as we have seen, would not be permissible under the Constitution. Can Congress give this power of regulation to the states? The answer to this would be too plain for controversy. The dividing line between state and Federal powers is fixed by the Constitution. That instrument, the supreme law of the land, specifies what is granted and thus fixes also what is reserved. A state cannot enlarge the powers of Congress, even in its own limits. This would be a surrender to that extent of its constitutional equality with the other states....

"It is equally clear that Congress can not part with or delegate to a state any power which has not been reserved to it. Congress can not return to the states a power given by the Constitution to Congress; much more can not Congress delegate or surrender a granted power to any portion of the States, for that would *pro tanto* invest those States with powers not possessed by the others."

of foreign commerce in violation of constitutional requirements.<sup>89</sup> Congressional consent to the exercise of state power in this manner was not covered by the clauses in the Constitution authorizing Congressional consent to the exercise of power by the states in certain instances. The effect of the proposed measure, it was alleged, would be to authorize states to exercise a power denied to both the states and Congress. It was criticized further as a "declaratory act" proposing that Congress assert for itself the power to "expound" the Constitution. This function, it was maintained, properly belonged to the judiciary.<sup>90</sup> The report concluded with a declaration favoring the maintenance of the independence of state and federal authorities in respect to the exercise of their powers. Confidence was expressed in the wisdom and impartiality of the Supreme Court in drawing the line separating the two spheres of power.

The report of the minority of the committee,<sup>91</sup> tacitly recognizing the force of the argument of the majority, endorsed a substitute for the original bill following more closely the phraseology of the Internal Revenue Act provision of 1862. The gist of the argument supporting the substitute was that what Congress could constitutionally do in reference to limiting the effect of internal-revenue taxes and subjecting instrumentalities, such as the national banks, to state taxation, it could do likewise in reference to tariff legislation bearing upon liquor imports.

The day following the announcement of the committee report the Supreme Court gave its ruling in the *Bowman* case. As has been noted, this decision rendered the position of the would-be dry

<sup>89</sup> *Ibid.*, p. 3. Article I, sec 8, cl. 1 of the Constitution provides: "The Congress shall have power to lay and collect taxes, duties, imposts and excises . . . ; but all duties, imposts, and excises shall be uniform throughout the United States"; Art. 1, sec. 9, cl 6: "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another."

<sup>90</sup> *Ibid.*, p. 4: "The bill is improper, if not unconstitutional, if considered as a declaration merely by Congress that such power exists in the states. That is purely a judicial question. The Congress can enact laws—they cannot expound them . . . . The settling of the meaning of the Constitution is not a legitimate object of legislative power. If it be conceded, as we have shown it to be, that the power to pass the bill as a rule of action, as a law, is not in Congress, then it is also shown that it may not be passed as a declaratory act, since such act is not necessary or proper for carrying into effect any power granted to the United States."

<sup>91</sup> Senators Wilson, of Iowa, Ingalls, of Kansas, Hoar, of Massachusetts, and Edmunds, of Vermont, signed the minority report.

states even more insecure than before by restricting state authority in dealing with interstate traffic in liquors. To the states demanding federal action to enable them to extend their laws to foreign liquor imports were added dry states in the interior which found their liquor regulatory policies threatened by the immunity accorded interstate shipments. Notwithstanding the vague suggestion in the *Bowman* opinion that relief might be extended to the affected states by a denial by Congress of the implication the Court had drawn from its silence, no action was taken toward that end in Congress during that year. Near the close of the second session of the Fiftieth Congress in 1889, however, Senator Wilson, of Iowa, brought the question again to the attention of the Senate. After a brief review of the arguments of the minority in the report on the Frye Bill he called attention to the "most peculiar conclusion" of the Court in the *Bowman* case which made action by Congress even more imperative. He served notice that in the next Congress an effort would be made to secure adoption of a measure to relieve the states of the disabilities imposed upon them in the regulation of both interstate and foreign traffic in liquors.<sup>92</sup>

Shortly after this notification was given the ruling of the Supreme Court in *Leisy v. Hardin* was announced. As has been pointed out above, the Court's opinion placed squarely upon Congress the responsibility for giving the prohibition states relief from the effects of its ruling. In the first session of the next Congress, accordingly, a number of bills were introduced relating to the subject. Some of these took the form of an attempt to withhold the force of the federal commerce power and regulations thereunder as limitations upon state police powers in dealing with traffic in intoxicants.<sup>93</sup> Others proposed to deal with the matter by a direct prohibition of the delivery of liquor in prohibition states by carriers.<sup>94</sup> Select committees of the House and Senate also held extended joint hearings on a proposed constitutional amendment prohibiting the manufacture and sale of intoxicating liquors.<sup>95</sup>

<sup>92</sup> *Cong. Rec.*, 50th Cong., 2d Sess., p. 1882.

<sup>93</sup> S. 398, introduced by Senator Wilson, of Iowa; H. R. 1002, by Representative Dingley, of Maine; H. R. 10269, by Representative Perkins, of Kansas; and H. R. 11782, by Representative Caswell, of Wisconsin. 51st Cong., 1st Sess.

<sup>94</sup> H. R. 3946, by Representative Breckinridge, of Arkansas; H. R. 5978, by Representative Struble, of Iowa; and H. R. 10048, by Representative Boutelle, of Maine.

<sup>95</sup> *S. Misc. Doc.* 217, 51st Cong., 1st Sess. These hearings were held after action had been taken by Congress on the Wilson Bill.

Favorable committee action was obtained upon a bill of the first description in the Senate, and upon two bills of the second type in the House.<sup>96</sup>

The Wilson Bill was taken up for consideration by the Senate on May 20, 1890. In phraseology it closely resembled the substitute for the Frye Bill recommended by the minority of the Judiciary Committee in the previous Congress, except that it attempted to deal with both foreign and interstate importations. As reported the bill read as follows:

No State shall be held to be limited or restrained in its power to prohibit, regulate, or control, or tax the sale, keeping for sale, or the transportation, as an article of commerce, or otherwise, to be delivered within its own limits, of any fermented, distilled, or other intoxicating liquids or liquors into such State from beyond its limits, whether there shall or shall not have been paid thereon any tax, duty, impost, or excise to the United States.<sup>97</sup>

The committee report accompanying the bill was brief, merely calling attention to the Court's suggestion in *Leisy v. Hardin* that Congressional action might be taken along the lines proposed to permit state authority to be exercised upon the interstate liquor traffic.<sup>98</sup>

The course of the bill through the Senate was a checkered one. It was approved only after it had been materially altered to meet numerous objections. In this process it lost its character as a

<sup>96</sup> The Wilson Bill was reported favorably in the Senate by the Committee on the Judiciary on May 14, 1890, *S. Rept.* 993, 51st Cong., 1st Sess. The Struble Bill, H. R. 5978, was reported back with an amendment by the Select Committee on the Alcoholic Liquor Traffic on April 24, 1890 *H. Rept.* 1697, 51st Cong., 1st Sess. It would have prohibited the delivery of intoxicating liquors by carriers in states where their sale was prohibited. The Boutelle Bill, H. R. 10048, was reported back with an amendment in the form of a substitute by the Commerce Committee on May 27, 1890, while the Wilson Bill was being debated in the Senate. *H. Rept.* 2192, 51st Cong., 1st Sess. Neither of the House bills was acted upon, but they were significant in that they envisioned in their original forms the type of regulation later employed in the Reed Amendment in 1917. See *infra*, pp 278 ff.

<sup>97</sup> *Cong. Rec.*, 51st Cong., 1st Sess., p 4954.

<sup>98</sup> *S. Rept.* 993, 51st Cong., 1st Sess. There was no objection to the report by any member of the committee. Senator George, of Mississippi, filed an individual report in which he stated that, although his views on the constitutionality of such legislation remained as originally expressed in the Judiciary Committee's report on the Frye Bill, he was nevertheless willing to support the accompanying bill because it seemed to be the only way possible to restore to the states the power of which they had been erroneously deprived by the Court's decisions.

limitation upon the operation of federal tax measures and assumed the character of a regulation of commerce. The numerous rephrasings of the bill while under consideration indicate the difficulty experienced in formulating a statute of this novel nature.

After some debate Senator Wilson offered a substitute for the original bill, changing it to provide that intoxicating liquors in interstate and foreign commerce should be regarded as having become a part of the common mass of property within the state of destination "when the actual and continuous transportation shall have terminated."<sup>99</sup> Before this proposal was acted upon an amendment in the way of a substitute for it, offered by Senator Gray, of Delaware, was adopted. The latter measure was then substituted for the original committee bill. Senator Gray's proposal subjected original-package shipments of liquors to state control when introduced for use, consumption, sale, or storage.<sup>100</sup> The Gray substitute was then amended by adoption of a revised wording proposed by Senator Wilson. Though retaining the basic language of Senator Gray's proposal, this amended version introduced the idea of fixation of the point of time at which state power should begin to operate.<sup>101</sup> By these rephrasings the bill became a declaration that, within certain defined limits, shipments of intoxicating liquors were to become subject to a state's police power upon arrival within its borders, regardless of the fact of their remaining in the original package.<sup>102</sup> As finally approved by the Senate<sup>103</sup> the measure read as follows:

All fermented, distilled or other intoxicating liquors or liquids transported into any State or Territory, or remaining therein, for use, consumption, sale, or storage therein, shall upon arrival in such State or

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<sup>99</sup> *Cong. Rec.*, 51st Cong., 1st Sess., p. 5324.

<sup>100</sup> *Ibid.*, p. 5430.

<sup>101</sup> *Ibid.*, p. 5438.

<sup>102</sup> The change in the character of the bill was acknowledged by a change in its title from "A bill to subject imported liquors to the provisions of the laws of the several states" to "A bill to limit the effects of the regulations of commerce between the several states and with foreign countries in certain cases." *Ibid.*, p. 5439.

<sup>103</sup> The vote on final passage was 34 to 10. After the bill's passage, Senator Voorhees, of Indiana, who opposed it, offered in a jesting spirit a motion to change the title to "A bill to overrule the decision of the Supreme Court in its interpretation and construction of the Constitution on the subject of commerce between the States, and thereby relieve the State of Iowa from the consequences of her own misguided legislation." The motion received the votes of six senators. *Ibid.*

Territory be subject to the operation and effect of the laws of such State or Territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquors or liquids had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in the original package or otherwise

These changes in the content of the measure came as the result of criticisms by those who, friendly to its fundamental purpose, disapproved of the original draft on various grounds. In general, the purpose of the changes was to make the act conform more nearly to the method of treatment suggested by the *dicta* of the Court in the *Leisy* opinion and to render the degree of subjection to state power more definite. Limitation of the applicability of the measure to liquors "transported into any State . . . or remaining therein, for use, consumption, sale, or storage therein" and employment of the phrase "upon arrival" to mark the point of time at which the state power should begin to operate supposedly achieved these objectives. This limitation of the scope of the measure was designed to prevent an interpretation which would permit advantageously situated states to tax or otherwise restrict the passage of liquors in transit to other states, or permit any state to discriminate against the out-of-state liquor trade. Limitation of the subjection to state power to liquors transported into a state and held there for certain definite purposes gave more particularity to the measure in this respect. The effect of these changes in narrowing the scope of the act was greater than was anticipated, as subsequent interpretation by the Supreme Court disclosed.

The debate in the Senate developed a wide variety of viewpoints on the constitutionality, as well as the expediency, of the proposal. No one questioned that the regulation of commerce was an exclusive national power and that Congress could not delegate this power to the states. Critics of the bill for the most part reiterated the objections made in the previous Congress by the Judiciary Committee on the constitutionality and propriety of the Frye Bill. Their main objection was that the measure under consideration amounted to an unconstitutional delegation of an exclusive power of Congress to the states.<sup>104</sup> Other grounds for invalidity urged

<sup>104</sup> See particularly the remarks of Senators Vest, of Missouri, Coke and Reagan, of Texas, and Eustis, of Louisiana, *Cong. Rec.*, 51st Cong., 1st Sess., pp. 4955, 4964, 5324, 5330-5332. Senator Eustis, whose attack on the measure was one of the high points of oratory in the debate, declared on this point: "Call it permission, call it pretermission . . . call it a license, call it a grant,



were that the bill would sanction a nonuniform regulation of commerce in violation of Article I, section 9, clause 6 of the Constitution,<sup>105</sup> and that it would subject the right of commercial intercourse to state control in violation of the guarantee of privileges and immunities in the Fourteenth Amendment.<sup>106</sup> The bill was also assailed as an attempt on the part of Congress to usurp judicial power in defining the boundary between state and national authority over the subjects of commerce.<sup>107</sup>

The suggestions of the Court in the *Bowman* and *Leisy* cases that action by Congress along the line contemplated might be taken constitutionally gave the opponents of the bill their greatest difficulty. Their answer was to point to the opinions in these and earlier cases holding the power of Congress over commercial regulation to be exclusive, and to dismiss the statements of the liquor cases regarding permissive action as *dicta* having no bearing on the questions therein decided. In this circumstance individual senators had the responsibility of making their own decisions on the constitutionality of the measure under consideration.<sup>108</sup> If wider authority in the states to deal with the liquor traffic was imperative, it should be sought through the avenue of a liberalization of the Court's views on the extent of the states' police powers, not by means of legislation by Congress.<sup>109</sup> The point was made fre-

disguise it as you may by cunning phraseology, looking to the dictionary for some words which can cover the true purpose and effect of this bill, and after all, it is nothing but bestowing upon the State of Iowa that which she has not now, in order to enable her to regulate commerce among the states in violation of the Constitution of the United States and in defiance of the interpretation of that Constitution by the Supreme Court of the United States." *Ibid.*, p. 5332.

<sup>105</sup> See the remarks of Senator Morgan, of Alabama, *ibid.*, p. 5369; Senator Eustis, of Louisiana, *ibid.*, p. 5331; and Senator Coke, of Texas, *ibid.*, p. 5325.

<sup>106</sup> See the remarks of Senator Morgan, of Alabama, *ibid.*, p. 5371, and of Senator Call, of Florida, *ibid.*, p. 5381.

<sup>107</sup> Senator Eustis declared on this point: "It is impossible to describe what this proposed law is. It is not any affirmative legislation in the ordinary sense. It is to be simply a declaratory law by Congress, a law to interpret the Constitution of the United States differently from the interpretation which it has received from the Supreme Court of the United States, a law which by its declaration and interpretation is a nullification, in my judgment, of a provision of the Constitution. . . . That is what this measure is, and nothing else. It is not to be a mandatory law; it is not to be a prohibitory law; it is to be a legislative what-is-it, and nothing else." *Ibid.*, p. 5330.

<sup>108</sup> See the remarks of Senator Vest, *ibid.*, p. 4955, and of Senator Coke, *ibid.*, p. 5325.

<sup>109</sup> See the remarks of Senator Morgan, *ibid.*, p. 5369, and of Senator Coke, *ibid.*, p. 5324.

quently that the passage of the act would set a dangerous precedent. It might lead to the erection of state barriers to commerce in many other subjects with Congressional permission, and thus reestablish chaotic conditions such as those under which commerce languished before the adoption of the Constitution.<sup>110</sup>

Supporters of the bill stressed the point that in its *dicta* in the liquor cases the Supreme Court had approved this method of relieving the states from the effects of its rulings. They maintained that it was useless to quibble about the constitutionality of the legislation when the Court had so spoken; and that, in any case, a final settlement of the constitutional question could not be secured unless the measure was passed and a test of its validity instituted. Numbered among the supporters of the measure were several who stated frankly their opinion that the Court had been wrong in denying in the first instance the power sought for the states. Though not wholly convinced of the propriety of the method suggested for reversing the result, they were willing to support the proposed bill to achieve the desired end.<sup>111</sup> Others, even though favoring it, doubted the efficacy of the bill in enabling the states to control effectively the traffic in intoxicants.<sup>112</sup>

<sup>110</sup> See the remarks of Senator Eustis and Senator Morgan, *ibid*, pp. 5332, 5369. Senator Vest, in order to demonstrate the breadth of the principle involved, offered an amendment to include in the scope of the act "fresh beef, veal, mutton, lamb or pork." He pointed to the recent decision of the Court in *Minnesota v. Barber*, 136 U. S. 313 (1890), invalidating a Minnesota meat-inspection law under the commerce clause as necessitating the inclusion of these commodities. His proposal was defeated, 32 to 5. *Ibid*, pp. 5425, 5429.

<sup>111</sup> This was the position of Senator George, of Mississippi; see *supra*, p. 85, note 98. Later, in the course of the debate, he reiterated his view in the following fashion: "Mr. President, I think we ought to be practical in the affairs of life, practical in the affairs of legislation. If I travel the road and meet nine men who are utterly irresponsible in law, who are above the law, and they take from me my property. .I am utterly without power of redress. I protest to them that the taking is pure robbery and ask them to restore my property. They refuse, but tell me: 'We will not do it, but we will tell you how you can get it. Just go over the way; there is a body of four hundred men; get their permission, and you shall have the property.' Shall I, being bound hand and foot, and unable to help myself, refuse to take my property back even by the permission of one who I think had no right to give permission?" *Ibid*, pp. 5329-5330. See also the remarks of Senator Pugh, of Alabama, *ibid*, pp. 5378-5379.

<sup>112</sup> Senator Blair, of New Hampshire, an ardent prohibitionist, criticized the bill as not extending state powers far enough, and predicted that further action would have to be taken through a constitutional amendment which would "give every State the power of an independent nation within its own limits

Attempts were made, however, to defend the constitutionality of the bill beyond the mere citation of the *dicta* of the liquor cases. A number of theories were advanced as bases upon which it could be sustained as a valid regulation of commerce. Early in the discussion Senator Edmunds, of Vermont, suggested that the proposal might be regarded as an "elastic" regulation of commerce by Congress, which employed the legislative authority of a state to determine how and under what circumstances a certain form of commerce should be carried on. It was uniform in that it applied to all states equally.<sup>113</sup> But, as Senator Vest pointed out in reply, this was simply an admission that Congress might delegate to the states power to regulate commerce. No further attempt to justify the act on this ground was made.

In his introductory remarks when bringing up the bill for consideration Senator Wilson, taking note of the point made in the Court's opinion in *Leisy v. Hardin* relative to the conditional nature of the inhibition upon state action arising from the silence of Congress, described his proposal as a measure permitting the police authority of the states to operate without conflicting with the implied will of Congress. It was, in other words, merely a *recognition* of an existing power, not a *grant* of a new one.<sup>114</sup> Senator Gray, of Delaware, embracing this idea, went a step further. He maintained that the passage of the bill would have the effect of reviving the state statutes previously held to be void under the rule laid down by the Court in the *Leisy* case, since the barrier to them

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over this subject," or one which would not only do that but also "reinforce the police powers of the State by an absolute prohibition" nationally. *Ibid*, p. 5386. It was significant of the understanding of the Senate concerning the scope of the proposed bill that he urged an amendment to it which would allow state power to operate upon liquors as soon as they passed over the state line. The amendment was rejected. *Ibid*, p. 5387.

Another indication of the dissatisfaction of the extreme prohibitionists with the proposed bill was the testimony of Mrs. Ada M. Bittering, a representative of the W. C. T. U. In hearings before a joint session of the House and Senate Committees on the Alcoholic Liquor Traffic on a proposed prohibition amendment she criticized the recently passed Wilson Bill as useless and probably unconstitutional. *S. Misc. Doc. 217*, 51st Cong., 1st Sess., pp. 13-19.

<sup>113</sup> *Cong. Rec.*, 51st Cong., 1st Sess., p. 4965.

<sup>114</sup> As stated by Senator Wilson the purpose of the measure was "simply to enable the States to organize for themselves and exercise their own right, their police power, in the protection of the health and morals and better condition of their people." *Ibid.*, p. 4955.

was the assumed will of Congress, not the inherent disability of the states to so act under the Constitution.<sup>115</sup>

Without abandoning this concept of the act as a release of state police power by denying the implication of Congressional silence, in the later stages of the debate the advocates of the bill developed their supporting argument one degree further. Note was taken of the *dictum* of the Court in the *Leisy* case to the effect that it was obligated to treat intoxicating liquors as a legitimate subject of commerce unless Congress should otherwise direct. Senator Hoar, of Massachusetts, maintained that the proposed bill was in itself a positive regulation of commerce, operating uniformly throughout the country and directed, not toward *states*, but toward a *thing*. It singled out one subject from the general mass of commercial commodities and with respect to it withdrew the protection against state interference which original packages in that commodity had enjoyed by reason of the vesting of power in Congress to regulate such commerce. The power to regulate commerce necessarily embraced the lesser power to declare what should not be the subjects of that regulation. Consequently, Congress might declare an article, because of its peculiar characteristics, to be outside the protection afforded by the grant of the commerce power to Congress. This action would place the subject under the authority of the state so far as interstate traffic in it was concerned.<sup>116</sup>

This rationalization of the act as a "de-legitimization" of commerce in liquors was generally adopted by the supporters of the bill in the later stages of the debate in the Senate. When pressed on the point, however, the originators of this theory were forced to admit

<sup>115</sup> *Ibid.*, p. 5433. This was essentially the effect ascribed to the act later by the Court. See the discussion of *In re Rahrer*, *infra*, pp. 97 ff.

<sup>116</sup> Senator Hoar stated the point in the following language "What they [the Court] have undertaken to say is... that, recognizing the complete and exclusive control of Congress over interstate and international commerce, Congress may also by legislation declare that certain subjects shall not be for legislative purposes treated as subjects of interstate commerce, and that the question whether a particular contract is a contract of interstate or international commerce within the legislative power is not to be determined by the Supreme Court as a question of absolute fact of which they may take judicial notice, but may be determined by the Congress of the United States in declaring that for all legislative purposes this shall not be considered as within the domain of interstate commerce." *Ibid.*, p. 4962.

The same idea was suggested in questions directed by Senator Gray and Senator Edmunds to Senator Vest a short time previously in the discussion. *Ibid.*, p. 4949.

that this method of "regulation" could not be applied to innocent articles of trade such as wool or grain. Regulation in this manner could be extended only to articles which were generally the subject of condemnation by the states under their police power.<sup>117</sup> In this concession, although it was not clearly perceived to be so by the critics of the bill, was the Achilles' heel of the de-legitimization theory. The theory was based on the plenary power of Congress to declare an article not to be a legitimate article of commerce. This was stated to be exclusively within the competence of Congress. But if only articles generally condemned as deleterious by the states could be subjected to the full police authority of the states by Congress, the question of what articles could be so treated would be subject to determination by the states. This would, however, constitute denial of the major premise upon which the de-legitimization theory was based. Congress would be restrained in its power to subject a commodity to state control by the relevancy of its action to state action. The proposition thus boiled down into this absurdity: The states cannot determine what shall be legitimate subjects of interstate commerce, for only Congress may determine that; but the states can determine what Congress may declare to be illegitimate subjects of commerce, for only state condemnation will justify Congressional subjection of an article to state control.

In view of the fact that the act finally passed amounted to a definition of the point at which intoxicating liquors as subjects of commerce should be deemed to have been incorporated into the mass of property of the state, and therefore subject to state jurisdiction, it is remarkable that little effort was made to explain it in terms of an exercise of power to fix the point of termination of an interstate commercial transaction.<sup>118</sup> As will be seen later, this

<sup>117</sup> *Ibid.*, p. 4962.

<sup>118</sup> Senator Wilson's first substitute for his bill, which was not adopted, contained a clear statement to the effect that intoxicating liquors should be deemed to have been incorporated into the mass of property of the State when their "actual and continuous transportation shall have terminated." See *supra*, p. 86. Senator Faulkner, of West Virginia, offered a substitute which also followed this approach. His substitute declared that intoxicating liquors "shall be considered as incorporated as a part of the common mass of property within such State or Territory, and subject to its regulation, control, or taxation, in the exercise of its police powers, on delivery of the original package by the common carrier to the owner or consignee." Owing to parliamentary maneuverings, his substitute was not voted upon. *Cong. Rec.*, 51st Cong., 1st Sess., p. 5375. In defending his proposal Senator Faulkner pointed out that the authority to fix

view of the nature of the bill was developed at greater length in the House; and, as events proved, the Supreme Court sustained it upon this basis.

The Wilson Bill encountered further difficulties in the House. The Judiciary Committee of that body reported out a substitute for the Senate bill, changing it in important respects. The House committee substitute read:

Whenever any article of commerce is imported into any State from any other State, Territory or foreign nation and there held or offered for sale, the same shall be subject to the laws of such State: *Provided*, That no discrimination shall be made by any State in favor of its own products against those of other States or Territories in respect to the sale of any article of commerce, nor in favor of its own products against those of like character produced in other States or Territories. Nor shall any transportation of commerce through any State be obstructed except in the necessary enforcement of the health laws of such State<sup>119</sup>

According to the committee report, this broadening of the terms of the bill was to bring within its scope such commodities as illuminating oils and certain food products, particularly oleomargarine, and thus enable states to enforce proper standards in regard to them. In another respect, however, the House bill narrowed the applicability of the Wilson Bill. The House version proposed to permit state power to operate only in preventing or regulating sales. It would not have subjected to state control importations of liquors for personal use.

Owing to the broader scope of the House substitute there was some confusion of the issue so far as the subjection of intoxicating liquors to state control was concerned. Certain House leaders,

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the point of time at which incorporation occurs must be included within the power to declare an article not to be a legitimate subject of commerce; but that simply to declare an article not to be a legitimate subject of commerce would be going too far, as the state would then have "absolute control and jurisdiction over it." *Ibid*.

<sup>119</sup> *H. Rept.* 2604, 51st Cong., 1st Sess. A separate report was made by Representative Adams, of Illinois, who advocated a substitute which related only to intoxicating liquors and merely forbade the introduction of such goods into states in violation of the laws thereof, unless in original packages of size as defined in the tariff statutes. His proposal, when it was brought up later, was defeated by a vote of 115 to 33. *Cong. Rec.*, 51st Cong., 1st Sess., p. 7563. This proposal, while ostensibly designed to eliminate the "original-package saloon," obviously would not have afforded much protection to the dry states. On the contrary, it would have given express Congressional authorization of shipments into dry states in specified quantities.

while professing an open-minded attitude on the question of extending the proposed method of treatment to all commodities, opposed the House substitute. They pointed out that the close of the session was near and that the injection of new issues might result in delay and eventual defeat of all legislation on the subject of intoxicating liquors. They wished to dispose of the immediate issue so that it would not arise to plague them in the ensuing election. Others opposed the House substitute because it narrowed the application of the proposed act to a point where a state could not interfere with interstate shipments intended for personal use. The opposition to the House substitute was thus a combination of those who opposed all legislation of this nature and those who favored the Wilson Bill rather than the House substitute.

Discussion of the constitutionality of the measure followed much the same lines as in the Senate, with the same arguments being offered pro and con. Because the House substitute proposed to deal with "any article of commerce," its supporters were unable to stress the point that the authority for the measure could be found in the power of Congress to de-legitimize a particular article and thus subject it to the state's police power. They therefore developed the point that the substitute bill was valid as a legislative declaration on the *point of time* that any article in commerce should be deemed to have been incorporated into the mass of property of the state, thereby ceasing to enjoy protection as an article of commerce.<sup>120</sup> On the other hand, for the same reason, the opposition placed even greater emphasis upon the danger to national

<sup>120</sup> See the remarks of Representative Thompson, of Ohio, *Cong. Rec.*, 51st Cong., 1st Sess., p. 7490, and of Representative Caswell, of Wisconsin, *ibid.*, p. 7497. The latter, advocating the passage of the House substitute, declared, "Some gentlemen have said that this bill would be a delegation of authority to the States to regulate commerce between the States. Not at all. It is a proposition to define when the jurisdiction of Congress shall cease over articles shipped from one State to another, and when State authority shall attach. We declare in substance by this measure that goods while in transit shall be subject to the regulations of commerce, but no longer. The bill in substance provides that when an article reaches its place of destination and is there held or offered for sale, and not until then, it becomes subject to the laws of the State into which it is shipped."

See also the remarks of Representative Oates, of Alabama, *ibid.*, p. 7501. He criticized the Senate bill as an unconstitutional delegation of power because it would permit the states to prohibit importations for personal use. He pointed out that the Senate bill would have to be sustained on the untenable theory that it "adopted" state legislation prospectively. *Ibid.*, p. 7502

commercial interests in subjecting interstate commerce to state control.<sup>121</sup>

Some supporters of the measure, not satisfied with the explanation of it as a definition of the point at which incorporation in the mass should be deemed to have occurred, defended it as a regulation of commerce which "adopted" state regulations on the subjects concerned.<sup>122</sup> The weakness of this theory was that it would have necessitated Congressional consent to any future changes in the state regulatory acts applicable to interstate and foreign commerce; for otherwise power would be delegated to the states to modify or to repeal acts thus "adopted" as a part of the system of federal regulation. It also failed to take into account the fact that there was to be no federal enforcement of such "adopted" state regulations.

The combined strength of uncompromising supporters of the Wilson Bill and opponents of all permissive legislation was insufficient to prevent substitution of the House committee bill for the Senate bill. A motion to substitute was carried on July 22 by a vote of 113 to 97,<sup>123</sup> and the House bill was then passed by a vote of 177 to 38.<sup>124</sup> A conference committee was set up when the Senate refused to accept the House substitute. The committee recom-

<sup>121</sup> See the remarks of Representative Chipman, of Michigan, *ibid*, pp. 7487-7489, and of Representative Rogers, of Arkansas, *ibid*, Appendix, pp. 493-494. Representative Culberson, of Texas, whose position was that the Court had erred in not permitting the states to apply their liquor regulations to interstate transactions, argued that the proposed act would effect an unconstitutional delegation of power, and that if it were passed "we might as well strike from the Constitution the commercial clause altogether. There will be no further use for it." *Ibid*, Appendix, p. 347.

<sup>122</sup> Representative Reed, of Iowa, a member of the committee which reported the bill, declared the proposed act to be "as clearly a regulation as though we were to embody in a general statute the provisions of the Iowa prohibitory law and make it applicable to the traffic in intoxicating liquors imported into that State, either from foreign nations or from other States." *Ibid*, p. 7432. Others who endorsed the adoption theory, arguing from analogies in federal legislation adopting rules of procedure of state courts for federal judicial practice, were Representative Perkins, of Kansas, and Representative Cutcheon, of Michigan. *Ibid*, pp. 7504, 7507. Both Perkins and Cutcheon strongly criticized the Court's decisions in the liquor cases. The latter suggested as an alternative to the passage of the act "political action that will reverse the Supreme Court." By this, he explained, he meant "reversing it in a legitimate manner by reconstructing it," and cited as illustrations the "reconstruction" of the Court following the *Dred Scott* and *Legal Tender* cases.

<sup>123</sup> *Ibid.*, p. 7563.

<sup>124</sup> *Ibid.*, p. 7564.



mended that the House recede from its amendment in favor of the Senate bill. The conference report was accepted somewhat reluctantly by the House.<sup>125</sup> As finally approved, the measure therefore had the same form as on final passage by the Senate, and related solely to the matter of traffic in intoxicating liquors. The bill was signed by the President, becoming effective as law on August 8, 1890.<sup>126</sup>

It is rather interesting to speculate upon what results would have followed had the House bill proved to be acceptable to the Senate. This action by Congress would have presented to the Supreme Court the question whether Congress might by law abrogate the original-package rule so far as it was applied to give protection to a right of sale, without reference to any question of the character of the goods involved. It is doubtful whether the Court would have acceded to such a sweeping denial of protection against state interference with interstate commerce. If validated, the House bill would have made unnecessary later action by Congress "divesting" in a similar manner other articles of the protection afforded by the commerce power under the original-package doctrine; but the act would undoubtedly have had a much broader effect than was contemplated by its originators. The method of dealing with the issue of divestment in each particular instance when judicial interpretation of the commerce power has proved to be unduly restrictive of state authority has preserved the advantage of flexibility in determination of the respective spheres of state and national power. At the same time the advantages of judicial annulment of state legislation alleged to impose a burden upon interstate and foreign commerce have been preserved.

#### 4. JUDICIAL CONSTRUCTION OF THE WILSON ACT

##### A. THE CONSTITUTIONALITY ISSUE

A TEST of the constitutionality of the Wilson Act was instituted immediately. On the day following the signing of the measure by the President one Rahrer, an agent for a Missouri liquor wholesaling house, sold a quantity of liquor in the original package to a customer in Topeka, Kansas, in violation of the Kansas prohibition

<sup>125</sup> *Ibid.*, p. 8231. The vote in favor of acceptance of the conference report was 119 to 98.

<sup>126</sup> 26 Stat. 313; 27 *United States Code* (1934), sec. 121.

law requiring a permit for such sales. He was arrested, and *habeas corpus* proceedings were instituted in his behalf before a federal circuit court. Two points were raised in his petition: (1) that the Wilson Act, upon which reliance was placed in making his arrest, was void as an unconstitutional delegation of the commerce power to the states; and (2) that the state act under which he was arrested, since it was passed prior to the federal act, must be considered void *ab initio* as to prohibition of sales in the original package in interstate commerce, under the rulings of the Supreme Court in the *Bowman* and *Leisy* cases.

The circuit court, not deeming it necessary to pass upon the first proposition, accepted the second contention as valid. The Wilson Act was held to have only a prospective operation, which would make it ineffective in extending the operation of the state act to the transaction in question. The release of the agent was accordingly ordered.<sup>127</sup> The ruling was brought before the Supreme Court for review.

Chief Justice Fuller, speaking for a unanimous Court, denied both contentions of the petitioner.<sup>128</sup> The constitutionality of the Wilson Act was not only upheld, but the state law was declared to be applicable under the circumstances of the case. The Court accepted as axiomatic that Congress might not delegate its powers to the states.<sup>129</sup> But, in the Court's view, the federal statute in question was not an attempt to delegate power. It was a regulation of commerce, uniform in operation, placing a particular commodity, intoxicating liquors, outside the protection of the commerce clause at an earlier period of time than would have been the case had not the act been passed. Its incidental effect was to allow state police power to operate upon a subject hitherto lying beyond state authority by reason of implications drawn from Congressional inaction.<sup>130</sup>

<sup>127</sup> *In re Rahrer*, 43 F. 556 (1890).

<sup>128</sup> *In re Rahrer*, 140 U. S. 545 (1891). Harlan, Gray, and Brewer, JJ., who had dissented from the ruling in the *Leisy* case, concurred in the result but not in all the reasoning of the Court. The grounds of difference were not stated in the report, but it may be presumed that their position was that the state police power might reach the transaction without reference to the federal statute.

<sup>129</sup> *Ibid.*, p. 560: "It does not admit of argument that Congress can neither delegate its own powers or enlarge those of a State."

<sup>130</sup> *Ibid.*, p. 562: "... Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the States, or to grant

Turning to the second question, relative to the applicability of the state law to the transaction, the Court admitted freely that in the absence of the federal act the state law could not apply in the circumstances. But a distinction was to be made between a state statute "absolutely void" under the Constitution and one conflicting in certain respects with an "implied exercise" of a power confined to the federal government. The barrier to state action set up in the *Leisy* decision was of the latter sort. This barrier rendered the state act "inoperative" upon property not strictly within the jurisdiction of the state, but did not nullify it.<sup>131</sup> The Congressional act was not in terms of permission to the state to act. Through it Congress "simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by an absence of specific utterance on its part."<sup>132</sup> Therefore, it was unnecessary for the state to reenact the law to make it applicable to sales in the original package. The federal statute had the effect of placing property where state jurisdiction could attach under the terms of existing state law.<sup>133</sup>

The theory upon which the Court sustained the constitutionality of the Wilson Act was that upon which the supporters of the House substitute bill had relied, rather than that which had been generally voiced in the Senate. As has been pointed out, in the Senate the argument against the measure as a delegation of the commerce power had been met by a citation of the *dicta* of the *Leisy* case to the effect that it was the *recognition by Congress of intoxicating liquors as legitimate articles of commerce* which compelled the Court to deny effect to state statutes in reference to liquors in

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a power not possessed by the States, or to adopt State laws. It has taken its own course and made its own regulation, applying to these subjects of interstate commerce one common rule, whose uniformity is not affected by variations in State laws in dealing with such property.... No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so"

<sup>131</sup> *Ibid.*, p. 563.

<sup>132</sup> *Ibid.*, p. 564.

<sup>133</sup> Prior to this ruling of the Supreme Court the effectiveness of the Wilson Act in extending the applicability of existing state statutes to intoxicating liquors in interstate commerce had been upheld in several decisions of lower courts. See *In re Spickler*, 43 F. 653 (Cir. Ct., S. D. Iowa) (1890), *In re Van Vliet*, 43 F. 761 (Cir. Ct., E. D. Ark.) (1890); and *State v. Fraser*, 1 N. Dak. 425, 48 N. W. 343 (1891).

interstate commerce. From this it had been argued that the proposed bill was valid as an act proclaiming the intention of Congress not so to regard them in its commercial regulations.<sup>134</sup> But in the House the broader substitute measure was defended as a constitutional exercise of authority by Congress in *marking the point at which goods should be regarded as having been incorporated into the common mass of property subject to state control*.<sup>135</sup> In previous cases the Supreme Court had set up the test of *sale* in the original package as marking the point of incorporation. Here it maintained that Congress might substitute a new rule by which the test of incorporation, and hence loss of protection arising from the fact of federal jurisdiction, should be determined.

The Court dealt with this point in the following language:

No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so.

The differences of opinion which have existed in this tribunal in many leading cases on this subject, have arisen, not from a denial of the power of Congress, when exercised, but upon the question whether the inaction of Congress was in itself equivalent to the affirmative interposition of a bar to the operation of an undisputed power possessed by the States.

We recall no decision giving color to the idea that when Congress acted its action would be less potent than when it kept silent.<sup>136</sup>

In other words, if Congress wished to divest an article of its character as an article of commerce at some point prior to actual incorporation into the mass, it might do so. The incident of sale in the original package, which had theretofore been considered determinative of the loss of character as an article of commerce, was a mere presumptive evidence. Positive action by Congress could nullify the conclusion based on this presumption.

In thus recognizing a Congressional power to define the point at which incorporation and resulting loss of protection under the commerce power should occur the Court carried forward its elaboration of the original-package and silence-of-Congress doctrines one important step. In *Brown v. Maryland* incorporation into the mass by acts of the possessor, and not the loss of distinctive character as

<sup>134</sup> See *supra*, p. 91.

<sup>135</sup> See *supra*, p. 94.

<sup>136</sup> *In re Rahrer*, 140 U. S. 545, 562 (1891).

an import, was deemed the controlling point in determining the limit of the protection afforded by the commerce clause. Later, after the original-package doctrine had been accepted as valid in both the interstate- and foreign-commerce fields, the Court's opinions disclosed a tendency to subordinate the question of physical incorporation into the mass to the question of retention of character as an import as a test of the admission of the operative effect of state power. In the matter of retention of commercial character and consequent protection reliance was placed in some degree upon the intent of Congress as revealed in its action or inaction.<sup>137</sup> In the *Leisy* case the Court intimated that retention of character as an article of commerce was primarily dependent upon Congressional will, rather than upon physical acts accomplishing incorporation. *In re Rahrer* confirmed this intimation. Loss of character as a subject of commerce and, therefore, loss of protection under the commerce power could be governed by a Congressional act. Incorporation in fact, regarded in the beginning as the controlling point, was subordinated to incorporation as defined by statute. State police power could become operative upon goods after completion of specified actions hitherto not regarded by the Court as determinative. The rule of incorporation into the mass was retained in fixing the point at which state power might operate, but it had become fictitious in the sense that positive Congressional action might determine this point's location.<sup>138</sup>

Certain questions were implicit in the view adopted by the Court in this case. There remained, of course, the important task of interpreting the language of the Wilson Act with reference to the point at which incorporation and loss of character as a subject of commerce occurred. Subsequent interpretation gave it a meaning in this regard probably less favorable to the extension of state power than was intended by Congress. There was also the question whether this type of legislation could be employed in reference to articles other than intoxicating liquors. Later legislation by Congress and judicial examination thereof have only partly cleared up this point. Finally, there was the question whether Congress, by legislative act, might move forward still further the point at which state laws should have operative effect upon articles of commerce. By reason of the narrowed application

<sup>137</sup> See *supra*, pp. 58-59.

<sup>138</sup> Dowling and Hubbard, *op. cit.*, p. 131.

given by the Court to the Wilson Act this question became a highly controversial one in Congress later, when legislation designed to strengthen state power over traffic in intoxicating liquors was under consideration.

The construction given the Wilson Act in this case enabled the Court to meet successfully the contention that the statute involved a delegation of power to the states. The Court denied that the Wilson Act was designed to "permit" the states to exercise power, or to "grant" power to them.<sup>139</sup> In later cases, however, the Court was not wholly successful in avoiding the use of language describing it as permissive or even delegative legislation. Thus in *Pabst Brewing Company v. Crenshaw* Justice White, who became the chief spokesman for the Court in cases involving the Wilson Act, stated that its purpose was "to make liquor after its arrival a domestic product and to confer power upon the States to deal with it accordingly."<sup>140</sup> It was conceded that the Court had held in other cases that the federal statute "delegated to the States plenary power to regulate the sale of liquors . . . shipped into the State from other States."<sup>141</sup> In *Vance v. Vandercook Company* Justice White declared that "the entire context of the act manifests the purpose of Congress to give to the States full legislative authority, both for the purpose of prohibition as well as that of regulation and restriction with reference to the sale in the original package of intoxicating liquors brought in from other States."<sup>142</sup> Again, in *Delameter v. South Dakota* the Court stated that the purpose of the Wilson Act was "to allow the States to exert ampler power" by setting up a special rule "enabling the States to extend their authority as to liquor shipped from other States."<sup>143</sup>

This careless use of language by the Court has been responsible

<sup>139</sup> *In re Rahrer*, 140 U. S. 545, 564 (1891): "Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of state laws in respect to imported packages in their original condition, created by the absence of utterance on its part. It imparted no power to the State not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction."

<sup>140</sup> 198 U. S. 17, 27 (1905). Italics mine in quotations from opinions in this paragraph.

<sup>141</sup> *Ibid.*, p. 25. See also the statement in *Rosenberger v. Pacific Express Co.*, 241 U. S. 48, 50 (1916).

<sup>142</sup> 170 U. S. 438, 448 (1898). Similar language was employed in *De Bary and Co. v. Louisiana*, 227 U. S. 108, 110 (1913).

<sup>143</sup> 205 U. S. 93, 98 (1907).

in part for the wide criticism of the reasoning upon which the law was sustained.<sup>144</sup> Strict regard by the Court for the construction placed upon it in the *Rahrer* case as a definition of the point of termination of an interstate shipment, so far as the protective influence of federal authority was concerned, would have obviated the use of such loose phraseology. The Court's failure to adhere strictly to the construction as given in that case was due, no doubt, to the fact that the theory advanced was new and not as yet clearly understood. Since the Court ascribed to the federal law a result which seemed to run counter to well-established principles regarding the division of authority over commercial regulation between the states and Congress, it had difficulty in reconciling the new doctrine with the old.

If the declaration of the Court in this opinion regarding the inability of Congress to delegate power to the states to regulate commerce is accepted at face value, it must be acknowledged that the Court intended to attach a meaning to the term "exclusive," when used in reference to the commerce power, fundamentally different from that formerly ascribed to it. In this case the Court placed the basis of exclusion of state action, not upon a constitutional disability in the states, but upon the will of Congress. Congress was conceded authority to permit state power to operate upon a subject hitherto protected by an assumed exclusive federal jurisdic-

<sup>144</sup> The logic of the *Rahrer* opinion has been much criticized. Bruce, *op. cit.*, p. 215, characterizes it as "unsound and difficult to follow." The Court, in his judgment, was attempting "to conceal and justify a retreat on the theory of an advance." He observes that "a remedy was necessary, but instead of the natural remedy of confession of error and repentance which every one would have appreciated, a nostrum of legal refinement was furnished which left the people even more in the dark as to the fundamental theories of government than before, and started another web of entangling legal and political refinement."

Gavit, *op. cit.*, sec. 111, pp. 239, 240, observes that "the force of the argument [that the Wilson Act constituted a delegation of power] seems irresistible." He maintains that state regulations on the subject of interstate commerce cannot be validated by "removing the silence of Congress," but only by "removing the Constitution," which is beyond the power of Congress.

For other discussions of the *Rahrer* opinion, more or less critical of its reasoning, see Sholley, *op. cit.*, p. 587; Lindsay Rogers, "Interstate Commerce in Intoxicating Liquors before the Webb-Kenyon Act," 4 *Virginia Law Rev.* 288, 304 (Jan., 1917); S. S. Merrill, "The Regulation of Interstate Commerce by the States," 50 *Central Law Jl.* 25, 28 (Jan., 1900); and the note on "Constitutionality of the Webb-Kenyon Act," 14 *Columbia Law Rev.* 330, 331 (April, 1914).

tion. This could be achieved only by the admission that subject matters within the exclusive jurisdiction of the federal legislature may be also within the range of state control. The concurrent power of the states is subordinate and may be restrained by the silence of Congress, but nonetheless it is recognized under the Constitution.

Chief Justice Marshall's exclusive-power theory and the later local-concurrent-powers theory did not necessitate denial that Congress and the states might reach the same subject with their regulations, and that in some instances the latter might have to yield to the exercise of the superior federal power. But Marshall's opinions had not intimated that Congress by a positive expression of its will might permit the authority of the state to be exercised in a manner forbidden to the state by reason of the exclusiveness of the federal commerce power. A conditional inhibition upon state action under Marshall's conception of the matter might arise only when Congress should have actually exercised its authority in some way. The conflict would be one between a state act and a federal act operating upon the same thing.

The Court gave no indication in the *Rahrer* case that it meant to modify its original views regarding the applicability of the original-package rule in determining the limits of the protective influence of the federal commerce power. Presumably that remained as before. The federal act was solely accountable for the changed result. This being true, the so-called "exclusive" power of Congress over commerce should be described as merely a "paramount" power in those instances in which Congress, by legislative act, may permit the laws of the states to apply. The conflict is between a paramount regulative power of the national legislature and a subordinate state regulative power. When Congress withdraws from occupation of the field and ceases to regulate through its silence, the states may enter. In this circumstance it would have been more appropriate for the Court to refer to the inhibition upon state authority as the "paramount" power of Congress over the subject, not as its "exclusive" power over it. The failure of the Court to use language of this nature has been largely responsible for the apparent inconsistencies in judicial statements concerning the limits of state power under the commerce clause and the effect of federal legislation in changing those limits.



## B. THE DELIMITATION OF STATE POWER UNDER THE WILSON ACT

The victory gained by the prohibition element in the validation of the Wilson Act proved to be a rather hollow one. Successive court decisions narrowed its applicability and made it only partly effective in enabling the states to apply their laws to the interstate liquor traffic.<sup>145</sup> The chief gains for the states were eventually discovered to lie in the acquisition of power to regulate or to prohibit sales of liquor in the original package when introduced through the channels of interstate and foreign commerce, and to impose non-discriminatory taxes upon this traffic. State power was thus moved forward one step in controlling interstate shipments. It was not moved forward to the point of making state laws operative upon liquors at the instant they entered the territory of the state.

As has been noted, the right of the state to regulate original-package sales of liquors introduced in interstate commerce was sustained in the *Rahrer* case. This was followed by a ruling upholding the authority of a state to grant to a state-store system a monopoly in the importation of liquor into the state for sale.<sup>146</sup> Beginning with the case of *Pabst Brewing Company v. Crenshaw*,<sup>147</sup> came a series of interpretations of the Wilson Act making more or less important concessions to state authority in the field of taxation.

The *Pabst* case raised the question of the validity of a Missouri beer-inspection law. Inspectional requirements upon beer shipped into the state were deemed to be met by the production of an affidavit by the manufacturer that the standards required by the state law for locally-manufactured beer had been complied with. An inspection "fee" producing a revenue thirty times the cost of this "inspection" was imposed upon the handlers of imported beer. Notwithstanding the fact that in recent cases the Court had held invalid state inspection fees excessive in amount in relation to the actual costs of inspection<sup>148</sup> as well as inspection requirements

<sup>145</sup> A discussion of these cases is found in Lindsay Rogers, "Interstate Commerce in Intoxicating Liquors before the Webb-Kenyon Act," 4 *Virginia Law Rev.* 353 (Feb., 1917). See also Bruce, *op. cit.*, and Frederick Hale Cooke, *The Commerce Clause of the Federal Constitution* (1908), sec. 99, pp. 217-224.

<sup>146</sup> *Vance v. Vandercook Co.*, 170 U. S. 438 (1898). The case is further discussed *infra*, p. 108.

<sup>147</sup> 198 U. S. 17 (1905).

<sup>148</sup> An inspection law was overthrown on the ground of unreasonably high fees by the Court the previous year in *Postal Telegraph Co. v. Taylor*, 192 U. S. 64 (1904).

having the effect of discriminating against goods in interstate commerce or imposing an undue burden thereupon,<sup>149</sup> by a five-to-four decision it sustained the validity of the state act in this case. The goods were held to have ceased to be articles of interstate commerce at the point where inspection was required. Any question of direct burden upon interstate commerce by reason of the revenue-producing feature of the state act or its failure to provide an adequate or reasonable inspection was met by the federal act.<sup>150</sup>

In the field of license taxes the Wilson Act was held to eliminate any conflict with the commerce power when such taxes were imposed upon solicitors of orders for delivery through the channels of interstate commerce,<sup>151</sup> upon local retailers selling beer in the original package introduced from another state,<sup>152</sup> upon dealers in liquors imported from abroad and sold in the original package,<sup>153</sup> and upon dealers engaged in selling liquors on an interstate ferry.<sup>154</sup> In these cases there was no element of discrimination against interstate or foreign commerce, since the acts had general application to all liquor sales, whether intrastate or otherwise. These rulings made it clear that the Wilson Act accomplished an overthrow of the principles of *Brown v. Maryland*, *Robbins v. Shelby County Taxing District*, and *Leisy v. Hardin*, so far as the federal commerce power operated as a restraint upon state authority to tax the sale of goods introduced through the channels of interstate and foreign commerce. The right of sale was treated as "incidental" to the transaction, and was placed under state authority by the federal law.

Though the Wilson Act was construed to extend state powers in these ways, successive court rulings established on the other hand

<sup>149</sup> *Brimmer v. Rebman*, 138 U. S. 78 (1891); *Voight v. Wright*, 141 U. S. 62 (1891), *Minnesota v. Barber*, 136 U. S. 313 (1890). The Court had held in two previous cases under the Wilson Act that laws which discriminated against interstate commerce were void. See *Scott v. Donald*, 165 U. S. 58 (1897), and *Vance v. Vandercook Co.*, 170 U. S. 438 (1898), both of which are discussed *infra*, pp. 106 ff.

<sup>150</sup> Justice Brown delivered a dissenting opinion, concurred in by Chief Justice Fuller and by Justices Brewer and Day. The minority maintained that the alleged "inspection" law, not being a bona fide police-power measure, was invalid as a direct burden upon interstate commerce.

<sup>151</sup> *Delameter v. South Dakota*, 205 U. S. 93 (1907).

<sup>152</sup> *Phillips v. City of Mobile*, 208 U. S. 472 (1908).

<sup>153</sup> *De Bary and Co. v. Louisiana*, 227 U. S. 108 (1913).

<sup>154</sup> *Foppiano v. Speed*, 199 U. S. 501 (1905).

that (1) states might not discriminate in their local regulations in favor of intrastate as against interstate commerce; (2) they might not interfere with the transportation of liquors into or through their jurisdictional limits; (3) they might not prohibit importation of liquors for personal use; or (4) prevent C.O.D. sales and deliveries in interstate commerce. The claim that interstate shipments of liquor had been de-legitimized and thus subjected completely to state control by the Wilson Act was definitely rejected by the Court. On the contrary, liquors were held to remain "legitimate" articles of commerce, enjoying in full the protection of the commerce power prior to delivery to the consignee.<sup>155</sup>

The first of these restrictive rulings came in the case of *Scott v. Donald*.<sup>156</sup> The validity of certain sections of the South Carolina Dispensary Law of January 2, 1895, setting up a state monopoly for the control of the liquor traffic, was the point at issue. The state act did not absolutely prohibit traffic in alcoholic beverages, but legalized it through a system of state stores. The Court held that in that circumstance the state might not establish regulations having the effect of restraining individuals from purchasing liquors for their own use from outside dealers. It could not restrict interstate purchases to licensed dispensers while permitting free purchase from them locally. The Wilson Act "was not intended to confer upon any State the power to discriminate injuriously against the products of other States in articles whose manufacture and use are not forbidden, and which are therefore the subjects of legitimate commerce."<sup>157</sup> Uniformity of treatment of interstate and domestic commerce in liquors by the state was required.

More serious to the cause of state control were the rulings of the

<sup>155</sup> In one of the later cases involving the Wilson Act, *Louisville and Nashville R. R. Co. v. Cook Brewing Co.*, 223 U. S. 70, 82 (1912), the Court declared: "By a long line of decisions, beginning even prior to *Leisy v. Hardin*, 135 U. S. 100, it has been indisputably determined.

"a. That beer and other intoxicating liquors are a recognized subject of interstate commerce,

"b. That it is not competent for any State to forbid any commercial carrier to transport such articles from a consignor in one State to a consignee in another;

"c. That until such transportation is concluded by delivery to the consignee, such commodities do not become subject to state regulations, restraining their sale or disposition."

<sup>156</sup> 165 U. S. 58 (1897).

<sup>157</sup> *Ibid.*, p. 100.

Court the following year in *Rhodes v. Iowa*<sup>158</sup> and *Vance v. Vandercook Company*.<sup>159</sup> The first of these cases dealt with the question of the validity of an Iowa statute requiring carriers to obtain permits for the transportation of intoxicating liquors within the limits of the state. The contention was made in support of the statute as applied to interstate shipments that the words "upon arrival in such State," found in the Wilson Act, should be construed broadly to mean entry into the limits of a state's territory. Lower-court decisions had been conflicting upon this point.<sup>160</sup> The Supreme Court held in this instance that the expression "upon arrival" was meant to mark the delivery of original packages by the carrier to the consignee, not entry into the state. Hence the state law was void in so far as it attempted to govern the actions of carriers in relation to an interstate shipment of liquors.

The reasoning of the Court was that a broader interpretation would cause the Wilson Act to confer power upon the state to give its regulations extraterritorial force. The inevitable consequence, it maintained, would be an abridgment of the right to contract beyond the limits of the State for such shipments.<sup>161</sup> Under this ruling a state was prevented from interfering with interstate shipments while in transit, even though destined for delivery within the state. State control was restricted to disposition of the goods after delivery in the original package. In other words, the Court held that the Wilson Act "recalled" its decision in *Leisy v. Hardin*, but

<sup>158</sup> 170 U. S. 412 (1898).

<sup>159</sup> 170 U. S. 438 (1898).

<sup>160</sup> State power was held operative under the Wilson Act at the boundary line of the state in *State v. Rhodes*, 90 Iowa 496, 58 N. W. 887 (1894), which was the case from which the appeal was taken to the Supreme Court. The same point had been made in *dicta* in *State v. Fraser*, 1 N. Dak. 425, 48 N. W. 343 (1891), and *In re Spickler*, 43 F. 653 (Cir. Ct., S. D. Iowa) (1890). In the latter case Justice Shiras stated that the Wilson Act "made subject to state police laws all imported liquors as soon as they should pass within the boundaries of the state" (p. 658). In the case of *In re Van Vliet*, 43 F. 761 (Cir. Ct., D. Ark.) (1891), the Court was noncommittal on this point, holding that state power became operative when liquor "arrives within the state where its transit terminates" (p. 763).

In other cases in which the question of the power of the state to prevent transportation of liquors across its borders was directly involved, the Wilson Act had been held not to authorize state action in this manner. See *Ex parte Edgerton*, 59 F. 115 (1893), and *Ex parte Jervey*, 66 F. 957 (1895), both of which were decided in the circuit court for the District of South Carolina, see also *Jervey v. The Carolina*, 66 F. 1013 (D. C., E. D. S. C.) (1895).

<sup>161</sup> *Rhodes v. Iowa*, 170 U. S. 412, 422 (1898).

not in *Bowman v. Chicago and Northwestern Railway Company*.<sup>162</sup> Since no state had as yet gone so far as to prohibit possession or use of intoxicating liquors, this ruling recognized the right of individuals to evade local restrictions on liquor sales by making purchases for their own personal use through the channels of interstate commerce.

The ruling in *Vance v. Vandercook Company* supplemented *Rhodes v. Iowa* by holding invalid that part of the revised South Carolina Dispensary Law requiring a citizen intending to import liquor from outside the state to submit a sample of the intended import for analysis and approval by a state chemist. A "constitutional" right to import legitimate articles of commerce for one's own use was held to be infringed by the procedure required.<sup>163</sup> On the other hand, the Court found valid that portion of the law conferring upon a state commission an exclusive right to import liquors to be disposed of by sale. A distinction was thus drawn between the power of the state to restrict the right to import for sale and the power to restrict the right to import for personal use. The latter was placed upon a constitutional basis, beyond reach of the Wilson Act and, apparently, of any act which a state might enact upon authorization of Congress. The part of the Wilson Act subjecting imported liquors to state control when intended for "consumption" or "use" was not directly held void, but the effect was practically that.

In a minority opinion Justice Shiras differed with the majority in this attempt to distinguish between the two classes of importations. The position of the minority was that the part of the state statute prohibiting all importation for sale except that which was to be handled through the state liquor stores was void as a regula-

<sup>162</sup> A minority of three, consisting of Gray, Harlan, and Brown, JJ., contended that the term "upon arrival" should be broadly construed to mean entry into the state. It is not altogether clear what the understanding of the framers of the statute was on this point. In view of the fact that Senator Blair, of New Hampshire, offered an amendment to the Wilson Bill to provide that state power might become effective upon liquors as soon as they crossed the state line, it may be inferred that the Senate understood the Wilson Act would confer power upon the states to apply their laws only after the termination of interstate movement. See *supra*, p. 89, note 112. On the other hand, it was asserted by some opponents of the Wilson Bill in the House that this measure would permit state power to attach as soon as the state boundary was crossed. See the remarks of Representative Oates, of Alabama, *Cong. Rec.*, 51st Cong., 1st Sess., p. 8220.

<sup>163</sup> *Vance v. Vandercook Co.*, 170 U. S. 438, 452-453 (1898).

tion of commerce. The minority contended that, if the right to import for personal use could not be restricted or abrogated by the state, then neither could the right to import for sale.<sup>164</sup> The Wilson Act was designed to submit commerce in intoxicants to state control under its police power, for police-power objectives. It was not designed to allow the states to *regulate commerce* in liquors by restricting importation for sale to the channels of a state monopoly. Language was used which indicated strongly that the minority would prefer to consider the Wilson Act operative only in those states which completely prohibited the consumption of liquors.<sup>165</sup>

The rule of immunity from state control of importations for personal use became a serious bar to effective enforcement of state prohibition when subsequently the Court held that the states lacked power to prevent the carrying on of an interstate C.O.D. liquor trade. Some states attempted to bring such sales under their regulatory authority by providing that delivery of goods and collection of the purchase price by the carrier constituted a "sale" within the jurisdiction of the state. Their statutes were overthrown by the Supreme Court.<sup>166</sup> For essentially the same reasons that regulation of interstate C.O.D. shipments and deliveries was declared to be beyond state authority, state laws forbidding shipment of liquors for personal use into local-option "dry" areas were held inapplicable to shipments by interstate carriers from outside the state,<sup>167</sup> as were laws forbidding sale of liquor to known habitual drunkards.<sup>168</sup> Similarly, a state was held to be restrained from imposing a prohibitive license tax upon agents of carriers engaged in transporting and distributing intoxicating liquors C.O.D.<sup>169</sup>

<sup>164</sup> *Ibid.*, p. 461. Chief Justice Fuller and Justice McKenna concurred in the minority opinion.

<sup>165</sup> *Ibid.*, p. 464.

<sup>166</sup> *American Express Co. v. Iowa*, 196 U. S. 133 (1905); *Adams Express Co. v. Kentucky*, 206 U. S. 129 (1907). In *Heyman v. Southern Ry Co.*, 203 U. S. 270 (1906), the Court ruled that the consignee in such cases should have a "reasonable time" in which to claim such shipments before state authority might intervene. In *Charleston & Western Carolina Ry Co. v. Gosnell*, 106 S. C. 84, 90 S. E. 264 (1915), it was held that, when delay in claiming goods by the consignee was obviously to further a plan to dispose of a cargo of liquor in violation of state laws, seizure of goods at a terminal while still technically in the custody of the carrier was permissible.

<sup>167</sup> *Louisville and Nashville R. R. Co. v. Cook Brewing Co.*, 223 U. S. 70 (1912).

<sup>168</sup> *Adams Express Co. v. Kentucky*, 214 U. S. 218 (1909).

<sup>169</sup> *Rosenberger v. Pacific Express Co.*, 241 U. S. 48 (1916).

After the establishment of the principle that the Wilson Act did not confer power upon states to regulate importation of liquors for personal consumption there was a recurrence of conditions similar to those ensuing as a result of the *Bowman* and *Leisy* decisions. Liquor wholesalers sent armies of solicitors of personal orders into dry and semidry states, and an interstate mail-order liquor trade of considerable magnitude grew up. State efforts to reach this traffic with restrictive legislation applying to carriers were unsuccessful, as has been indicated. State statutes designed to prohibit or to regulate the solicitation of liquor orders for personal use were also passed. Although earlier rulings by lower courts did not generally sustain the validity of these state acts in relation to interstate sales,<sup>170</sup> in a South Dakota case a statute of this character was held to apply to solicitation of interstate orders.<sup>171</sup> An appeal brought the question of the validity of the state act before the Supreme Court of the United States.

Faced by a rising storm of public opinion against the "mail-order saloon," the Supreme Court sustained the South Dakota court's ruling.<sup>172</sup> As set forth in Justice White's opinion, the position of the Supreme Court was that, since the state had power under the Wilson Act to forbid sales of imported liquors in the original packages, it had authority to regulate the actions of individuals within its jurisdiction connected with the promotion of such sales. But as has been suggested,<sup>173</sup> this amounted to allowance of state interference with the right to import for personal use, which had been founded upon a "constitutional" basis in *Vance v. Vandercook Company*. Moreover, it ignored the point emphasized so strongly by the Court in the *Rhodes* case that the Wilson Act did not confer power upon the state to prevent the making of contracts outside the state for delivery of goods into the state. In later decisions the Court modified materially the ruling in this case

<sup>170</sup> For cases in which laws of this character were held inapplicable to solicitors of interstate sales see *In re Bergen*, 115 F. 339 (Cir. Ct., Kans.) (1900), *State v. Hickox*, 64 Kans. 650, 68 Pac. 35 (1902); *State v. Hanaphy*, 117 Iowa 15, 90 N. W. 601 (1902).

<sup>171</sup> *State v. Delameter*, 20 S. D. 23, 104 N. W. 537 (1905).

<sup>172</sup> *Delameter v. South Dakota*, 205 U. S. 93 (1907). The Chief Justice dissented from the ruling, but did not submit an opinion. It will be noted that this ruling constituted a concession that in reference to solicitation of liquor sales the Wilson Act abrogated the principle applied in *Robbins v. Shelby County Taxing District*, 120 U. S. 489 (1887). See *supra*, p. 59.

<sup>173</sup> Bruce, *op. cit.*, p. 220.

by holding that solicitations for delivery of liquors for personal consumption involving actual interstate communication by telephone<sup>174</sup> or a personal interview by the shipper<sup>175</sup> were beyond the state's regulatory power.

The concessions made by the Court to the extension of state power in the interpretation of the Wilson Act were insufficient to satisfy the advocates of strict regulation of the liquor traffic. Soon after the announcement of the decisions in the *Rhodes* and *Vandercook* cases demands began to be made upon Congress for further legislation enlarging state authority to deal with the traffic in its interstate aspects. The legislation eventually secured was founded on a theory quite different from that of the Wilson Act, and will be considered later. The Wilson Act, however, was not discarded. On the contrary, it became a model for acts dealing in a similar manner with other commodities.

The importance of the Wilson Act cannot easily be overestimated. By it Congress made the first great breach in the wall of protection thrown up around interstate and foreign commerce by judicial construction of the commerce clause. The events connected with the origin and application of the act marked the beginning of a series of withdrawals by the Court from its position as the supreme and exclusive arbiter in the delimitation of the scope of state power under the commerce clause. This law furnished the occasion for a restatement of the original-package doctrine in terms which rendered it a much less formidable obstacle to the exercise of state power over goods in interstate commerce. It supplied a means for overcoming the effect of the Court's rulings in this field. The establishment of the divestment principle has induced indirectly a more liberal judicial view of the scope of the police and taxing powers of the states in relation to commerce. The Wilson Act signaled an assault upon the doctrine of exclusiveness of the commerce power which has had as its practical outcome the substitution of the doctrine that Congressional power to regulate commerce in certain goods, if not in all goods, is merely a paramount, not an exclusive, power.

<sup>174</sup> *Kirmeyer v. Kansas*, 236 U. S. 568 (1915)

<sup>175</sup> *Rossi v. Pennsylvania*, 238 U. S. 62 (1915).



## CHAPTER IV

### CONFIRMATION OF STATE POWER BY THE WILSON ACT FORMULA

THE method embodied in the Wilson Act for releasing state police powers held in restraint by judicial interpretation of the commerce clause was a happy discovery for federal and state legislative bodies. A way was provided for circumventing judicial rulings under the original-package doctrine which, in the judgment of Congress, went too far toward restricting state authority. In such cases the Court had recognized essentially the same relation between federal and state power as that which prevailed by express constitutional provision in the levying of tonnage duties, the taxation of imports and exports, and the formation of interstate compacts by the states. As an alternative to uniform federal regulation, or to the complete absence of any regulation of commerce in original packages, state regulation by Congressional consent was made available.

It was to be presumed from the language of the Court in the *Leisy* opinion that the divestment principle could be extended to any article of commerce the manufacture and sale of which a state might wish to restrict for the protection of public health, safety, or morals.<sup>1</sup> The concept of a constitutional "right" to free disposal of original-package goods introduced through interstate and foreign commerce had been definitely rejected by the Court. The im-

<sup>1</sup> *Leisy and Co. v. Hardin*, 135 U. S. 100, 123-124 (1889): "Undoubtedly, it is for the legislative branch of the state governments to determine whether the manufacture of particular articles of traffic, or the sale of such articles, will injuriously affect the public, and it is not for Congress to determine what measures a State may properly adopt as appropriate or needful for the protection of the public morals, the public health, or the public safety; but notwithstanding it is not vested with supervisory power over matters of local administration, the responsibility is upon Congress, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the State in dealing with imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action."

porter's privilege of disposing of such goods through sale was merely an "incidental" right. By a legislative definition of the point at which incorporation into the mass should be deemed to occur this right could be subjected to state control. The privilege of sale arose from an assumption drawn from Congressional inaction, not from an inherent constitutional limitation upon state authority.

Congress has acted to deny this assumption in several other instances. Congressional legislation employing the Wilson Act formula falls into two classes, which differ in the degree of significance attaching to federal divestment statutes in achieving a broader judicial definition of state police power. On the one hand, there have been those cases in which divestment statutes, denying the implication of Congressional silence, have apparently had the effect only of confirming the Supreme Court's view that the commerce clause and the silence of Congress do not restrict state police power to deal with certain commodities while yet within the range of federal power. Confirmatory legislation of this type has been passed by Congress in respect to commerce in game and in certain food products, chiefly oleomargarine colored to resemble butter. Decisions of lower courts had raised doubts, however, concerning the applicability of state laws to such goods while they were still subject to federal regulatory power under the commerce clause.

In a second category belong those federal statutes following the Wilson Act formula which have had the effect of extending state authority to subjects which it might not have otherwise reached. In 1929 a successful effort to redefine by this means the regulatory power of the states in reference to prison-made goods was made. Several unsuccessful attempts to secure passage of this type of statute have been made in Congress. Obviously the divestment mode of regulation has greatest significance when employed to extend state authority beyond the limits set by judicial decisions. The controversial literature concerning the constitutionality and expediency of divestment legislation naturally centers around its use in this sense. An analysis of the circumstances leading to the passage of acts falling within the first category is made in this chapter. Consideration of actual and proposed legislation coming within the second category will be given in the next chapter. As these surveys will show, there has been much controversy in

Congress, not only over the degree to which it has "regulated" commerce by its silence so as to exclude state action, but also over the question of the extent to which it is empowered to submit interstate commerce to state control by divestment legislation.

### 1. GAME BIRDS AND ANIMALS

DURING consideration of the Wilson Bill in Congress a strong effort was made to generalize the terms of that measure to make it applicable to "any article of commerce." The House version of the bill gave it this broad scope, but objection was made by the Senate, and the bill reverted to its original form. In view of the sentiment which the action of the House indicated it was only to be expected that attempts would be made to extend the divestment method of treatment to commodities other than intoxicating liquors after the Wilson Act was passed and had been upheld by the Supreme Court. The efforts to extend this method of regulation to oleomargarine were particularly persistent during the decade of the 90's. Before these efforts were successful, however, regulation by divestment was employed in another direction.

This was done with the passage of the Lacey Act of 1900, which subjected to state regulation commerce in the dead bodies of game birds and animals. By the end of the nineteenth century the rapid depletion of wildlife resources of the country had forced upon the attention of state legislative bodies the problem of game conservation. Since one of the chief threats to extinction of wildlife was the wholesale slaughter of game and song birds and game animals for the market, much of the resulting regulatory legislation was directed toward curbing this type of activity. To this end laws were adopted by the states generally, establishing close seasons and requiring licenses for taking game; prohibiting shipment of the dead bodies of certain kinds of game birds and animals from the state; prohibiting the possession, sale, or transportation of the bodies of certain species of game during the close season; and, in some instances, prohibiting their sale absolutely.

The enforcement of state regulations of this character inevitably raised the question of interference with interstate and foreign commerce. There was necessarily involved a restraint upon the right to export game from a state for commercial purposes, as well as upon the right to import game from other states or foreign countries

for sale or personal consumption.<sup>2</sup> Early decisions of state courts were conflicting on the question of the power of a state to prohibit the export of lawfully taken game. In some jurisdictions laws imposing restraints upon the right to export game, when sale was permitted locally, were held invalid as constituting direct burdens upon interstate commerce.<sup>3</sup> In other states the power of the state to prohibit absolutely or to restrict, so far as was deemed advisable, the sale of game, and hence its exportation, was sustained.<sup>4</sup>

This issue at length came before the Supreme Court of the United States in the case of *Geer v. Connecticut*.<sup>5</sup> The police power of a state was held to include a right to prohibit or to limit the exportation of game taken within its boundaries. This result the Court based upon the theory that, wild game being the common property of the people of the state, the right to reduce it to private ownership was dependent upon the will of the state. A state might make the right to reduce to possession complete, or it might qualify in any manner deemed advisable the property right thus granted. Prohibition of shipment from the state was a valid qualification on the right to reduce *ferae naturae* to private pos-

<sup>2</sup> Prior to the raising of these issues the question of state interference with commerce through establishing restrictions upon fishermen from other states was presented. In *Smith v. Maryland*, 18 How. 71 (U. S.) (1855), the power of a state to regulate the manner of taking shellfish within its jurisdiction was recognized by the Supreme Court as against a claim of interference with rights claimed under federal laws for the enrollment and licensing of vessels for the interstate coastal and fishing trade. See also *Manchester v. Massachusetts*, 139 U. S. 240 (1891), and *Lee v. New Jersey*, 207 U. S. 67 (1907). The practice of a state's reserving fishing privileges to its own citizens or granting them to citizens of other states only upon a reciprocal basis was inaugurated at an early date. An example was the Delaware Act of Feb. 12, 1812, *Laws of Delaware*, 1806-1813, Chap. CCIX, pp. 568-569, reserving the right to gather oysters, terrapins, and clams to the state's residents, with an exception in favor of the citizens of Maryland, "so long as the shell fisheries of the waters of that State shall remain free to the citizens of this State and no longer." The right of a state to discriminate in favor of its own citizens in granting access to its shell fisheries was upheld by the Supreme Court in *McCreedy v. Virginia*, 94 U. S. 391 (1876).

<sup>3</sup> *State v. Saunders*, 19 Kans. 127 (1877); *Territory v. Evans*, 2 Idaho 634, 23 Pac. 115 (1890). See also the comment on this point in *Ex parte Fritz*, 86 Miss. 210, 38 So. 722 (1905).

<sup>4</sup> *State v. Geer*, 61 Conn. 144, 22 Atl. 1012 (1891); *Organ v. State*, 56 Ark. 267, 19 S. W. 840 (1892); *State v. Northern Pacific Express Co.*, 58 Minn. 403, 59 N. W. 1100 (1894).

<sup>5</sup> 161 U. S. 519 (1896). This was an appeal from the ruling in *State v. Geer* referred to *supra*, note 4.

session, even though intrastate trade in such commodities was legalized by the state.<sup>6</sup>

This broad view of the police power of the state proved only partly effective in enabling the states to protect their wildlife against wholesale slaughter for the market. They were handicapped in enforcing restrictive statutes by reason of their limited jurisdiction, which prevented the taking of adequate measures for detection of illegal shipments. They were also handicapped by the fact that the introduction of game taken in other states afforded a ready means of evasion of state regulations. A seizure of game in connection with an alleged violation of a state statute respecting possession, transportation, or sale would be met by a contention that the seized game was an article of commerce of out-of-state origin, and hence not covered by the receiving state's conservation laws. When state authorities sought to apply statutes prohibiting possession or sale to all game, having no regard to whether the game was taken locally or imported, the courts were called upon to define the line between the police power of the state in game conservation and the rights of individuals to engage in interstate and foreign commerce in game lawfully taken elsewhere.

In some instances state courts avoided the issue by construing the clauses of state laws respecting possession, transportation, or sale of game during the close season to be inapplicable to imported game. The point was made that a state could have no interest in conserving the game of other states or countries; hence a state's regulations should be held applicable only to game taken within its boundaries.<sup>7</sup> In those cases in which the question of interference with commerce was met directly decisions of state courts were in disagreement. In one of the earliest of them the New York Court of Appeals sustained a state statute against a contention of interference with interstate commerce. The court insisted that in the absence of Congressional regulation the states possessed a

<sup>6</sup> An important qualification was later placed by the Court upon this principle in *Foster-Fountain Packing Co. v. Haydel*, 278 U. S. 1 (1928), wherein a Louisiana statute forbidding the exportation of shrimp taken in its waters, unless canned, was overthrown as a direct burden upon interstate commerce. See also *Johnson v. Haydel*, 278 U. S. 14 (1928).

<sup>7</sup> *Commonwealth v. Hall*, 128 Mass. 410 (1880); *People v. O'Neil*, 71 Mich. 325, 39 N. W. 1 (1888); *Commonwealth v. Wilkinson*, 139 Pa. St. 298, 21 Atl. 14 (1891); *State v. McGuire*, 24 Ore. 367, 33 Pac. 666 (1893); *Dickhaut v. State*, 85 Md. 451, 37 Atl. 21 (1897).

power to regulate commerce.<sup>8</sup> It quoted with approval the statement of Chief Justice Taney in the *License Cases* on the concurrent nature of the commerce power, and seemed willing to place its finding upon a general concurrent-powers construction of the commerce clause. Other state courts relied upon the police power of the state to sustain state laws of this character, pointing out that the interference with interstate and foreign commerce which resulted was only "incidental" or "indirect."<sup>9</sup>

Opposed to these opinions were those which held a state to be powerless to interfere with the possession or the disposal of game imported from abroad or from other states while remaining in the original package. Although *dicta* in earlier opinions subsequent to the ruling of the Supreme Court in *Leisy v. Hardin* had indicated that such action by state authorities would be void under the commerce clause,<sup>10</sup> the first adverse holding directly involving this point was not made until 1899. A section of the New York game law prohibited possession of certain game fish during the close season in that state. An attempt was made to apply the penalties of this act in reference to fish imported from Canada and remaining in possession of the importer beyond the time allowed. The New York courts held the act inoperative upon such shipments. One ground given for the holding was that the state statute conflicted

<sup>8</sup> *Phelps v. Racey*, N. Y. 10 (1875).

<sup>9</sup> *Magner v. People*, 97 Ill. 320 (1881); *Ex parte Maier*, 103 Cal. 476, 37 Pac. 402 (1894); *Merritt v. People*, 169 Ill. 218, 48 N. E. 325 (1897); *State v. Randolph*, 1 Mo. App. 15 (1876); *Stevens v. State*, 89 Md. 669, 43 Atl. 929 (1899). In *State v. Schumann*, 36 Ore. 16, 58 Pac. 661 (1899), a state law forbidding the sale of trout at any time within the state was sustained as to such game legally caught elsewhere and brought into the state, but without consideration of the question of interference with interstate commerce. In the *Maier* case the California Supreme Court indicated that it would consider invalid a statute interfering with the shipment of game into the state for personal use so long as it remained in the original package. This question was not directly involved in the case at hand, which concerned the sale of part of a carcass of a deer imported from Texas.

<sup>10</sup> In *Commonwealth v. Wilkinson*, 139 Pa. St. 298, 21 Atl. 14 (1891), the state act in question was construed to be inapplicable to game shipped into the state; but the Court added that, if the act was intended to have this effect, it would be "nugatory." In *Dickhaut v. State*, 85 Md. 451, 37 Atl. 21 (1897), a similar view was expressed. Two years later, however, in *Stevens v. State*, 89 Md. 669, 43 Atl. 929 (1899), the Maryland Court of Appeals upheld an amendment to the state game law making the prohibition of possession applicable to all game, regardless of its out-of-state origin. See also the comment on the *Maier* case *supra*, note 9.

with the will of Congress as indicated in tariff statutes, and invaded a field of power belonging to Congress exclusively.<sup>11</sup> Chief reliance was placed upon the original-package doctrine of *Brown v. Maryland*.<sup>12</sup>

During the same year a federal circuit court held that a state might not prohibit sale of game in the original package, when introduced from another state.<sup>13</sup> The principles laid down by the Supreme Court in the *Bowman* and *Leisy* liquor cases were held to be controlling. A situation was thus in the process of development through these decisions similar to that which forced Congress to enact the Wilson Act. Effective enforcement of a local policy of game conservation demanded a certain degree of interference with interstate and foreign commerce which some courts considered inadmissible under the commerce clause. There was no suggestion in any of these judicial opinions that Congressional consent might enable states to make their game laws applicable to interstate shipments. Nevertheless, steps were immediately taken to extend this consent, even before the Supreme Court had been given an opportunity to give a definitive ruling on the question of state power to prohibit possession or sale of imported game.

In order to assist the states in making their game conservation laws more effective Representative Lacey, of Iowa, introduced a bill in Congress in 1900. The bill provided, among other things, that transportation of game killed in violation of state laws should be prohibited.<sup>14</sup> The committee to which the bill was referred recommended the inclusion of a section to clarify the point regarding the applicability of state laws to the sale, transportation, or possession of game of extrastate origin. The additional section, following the model of the language of the Wilson Act, subjected

<sup>11</sup> *People v. Buffalo Fish Co., Ltd.*, 62 N. Y. S. 543 (S. Ct.) (1899); *ibid.*, 164 N. Y. 93, 58 N. E. 34 (1900). The part of the ruling basing invalidity upon the commerce clause had the support of but three judges, an additional member concurring in the result only on the ground that the state act was not meant to reach interstate and foreign imports of game, a point which the majority opinion also made. Three judges in the minority held the act to be applicable to such shipments as a proper police-power measure, regardless of the federal tariff statute.

<sup>12</sup> 12 Wheat. 419 (U. S.) (1827); see *supra*, p. 52.

<sup>13</sup> *In re Davenport*, 102 F. 540 (Cir. Ct., E. D. Wash.) (1900).

<sup>14</sup> H. R. 6634, *Cong. Rec.*, 56th Cong., 1st Sess., p. 930. Unsuccessful efforts to obtain passage of an act of this nature had been made in the preceding Congress.

to the operation of state laws commerce "in the dead bodies, or parts thereof" of game birds and animals.<sup>15</sup>

The bill, with the proposed amendment, encountered little opposition in the House. The necessity for inclusion of the divesting section was pointed out by the sponsor of the bill, who referred particularly to the recent New York court decision holding imports of foreign game to be protected by federal tariff statutes against state interference with possession or sale in the original package.<sup>16</sup> The question of constitutionality was summarily disposed of by reference to the Wilson Act and the opinion in the *Rahrer* case upholding it. The phraseology of the Wilson Act was apparently deemed to be satisfactory in conferring the necessary power upon the states, notwithstanding the narrow interpretation already given the act in *Rhodes v. Iowa* and *Vance v. Vandercook Company*.<sup>17</sup> With little discussion and with only one minor change<sup>18</sup> the bill was passed by the House and Senate. It became law<sup>19</sup> with the signature of the President on May 25, 1900.

Later judicial pronouncements on the subject of state regulation of commerce in game were such as to indicate that the divesting section of the Lacey Act was unnecessary to allow the states to exercise the power specified. Such attention as this section has received from the Supreme Court was given in connection with a case originating in the courts of New York. Prior to this an unsuc-

<sup>15</sup> *H. Rept.* 474, 56th Cong., 1st Sess. The section recommended for adoption read as follows: "...All dead bodies, or parts thereof, of any foreign game animals, or game or song birds, the importation of which is prohibited, or the dead bodies, or parts thereof, of any wild game animals, or game or song birds transported into any State or Territory, or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such animals had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced in the original package or otherwise."

<sup>16</sup> *Cong. Rec.*, 56th Cong., 1st Sess., pp. 4873-4874. Reference was to the trial-court decision in *People v. Buffalo Fish Co., Ltd.*, 62 N. Y. S. 543 (S. Ct.) (1899), since the ruling of the Court of Appeals sustaining the lower court's decision had not yet been given when the bill was under consideration.

<sup>17</sup> See *supra*, pp. 106-109.

<sup>18</sup> An amendment was adopted excepting "birds or bird plumage manufactured from the feathers of barnyard fowl" from the scope of the divesting section.

<sup>19</sup> 31 Stat. 188. The divesting provision is now found in 18 *United States Code* (1934), sec. 395.



cessful attempt was made by New York authorities to enforce the penalties of the state game law against a dealer in the bodies of game birds shipped into the state from other states and held by him in violation of the law restricting possession during the close season. The Court of Appeals upheld a dismissal of the charge against the accused on the ground that at the time of the commission of the alleged offense the state law as interpreted by it previously was applicable only to game taken within the state.<sup>20</sup> The court indulged in *dicta*, however, indicating that, if the state law had been modified to apply to interstate and foreign shipments of game subsequent to the passage of the Lacey Act, the alleged offense could be reached by state legislation by virtue of the federal statute.<sup>21</sup>

The New York game law was amended in 1902 to reach all game by its terms, regardless of the place of origin. Soon afterward a case arose posing the question of the applicability of this law to a shipment of game which had been imported from abroad and upon which customs duties had been paid. Relying upon the divestment section of the federal act, the trial court denied the petition of the accused for a release from custody on a *habeas corpus* writ. The Appellate Division of the state Supreme Court reversed this ruling.<sup>22</sup> The Lacey Act was given a construction which made its divesting section applicable only to game shipped in interstate commerce, or to the bodies of foreign game birds and animals, the importation of which was prohibited under federal law. Since the game in question had been imported under federal tariff regulations, the court held that there was no authorization in the federal act for applying state restrictive statutes while the game remained in the original package.<sup>23</sup>

<sup>20</sup> *People v. Bootman*, 180 N. Y. 1, 72 N. E. 505 (1904), affirming 88 N. Y. S. 887 (1904). This interpretation of the state law under the Lacey Act was not in harmony with that of the Supreme Court in the *Rahrer* case, wherein the Wilson Act was held to have the effect of extending automatically the application of the state prohibition law to subjects of interstate commerce when the state law was general in its terms, as was true here. Cf. the dissenting opinion of McLaughlin, J., in *People v. Bootman*, 88 N. Y. S. 887, 892 (1904).

<sup>21</sup> 180 N. Y. 1, 10: "The action of Congress [in passing the Lacey Act] has taken away all question of interstate commerce, so that the state can act with entire freedom and can prevent the shipment of game into or out of its own territory; and if game is imported, it can regulate or prohibit the sale thereof."

<sup>22</sup> *Silz v. Hesterberg*, 96 N. Y. S. 296 (1905).

<sup>23</sup> While the purpose of the Lacey Act was undoubtedly to submit all foreign shipments as well as interstate shipments to state control, the language of the

The state Court of Appeals, to which the case was then carried, reversed the ruling of the Appellate Division of the state Supreme Court and sustained the dismissal of the petition by the trial court.<sup>24</sup> The Lacey Act was held to give broad authority to the states to exercise their police power in respect to possession and sale of game, eliminating all questions of interference with either foreign or interstate commerce. This broad interpretation of the act was necessary to achieve its objective, which was "to enable the states by their local law to exercise a power over the subject of the preservation of game and song birds, which without that legislation they could not exert." The power thus conferred upon the states extended to importations of game from foreign countries as well as from other states.<sup>25</sup> Though the court did not state that the power thus conferred was a power to regulate commerce, language more indicative of a construction of the Lacey Act as a delegation of the commerce power could hardly have been chosen. Resort to a finely spun theory concerning the removal of an implication drawn from the silence of Congress was precluded. In this instance the original will of Congress was clearly discoverable: it was expressed in the tariff statute. According to the principles laid down in *Brown v. Maryland*, which the opinion made no attempt to controvert, a right of possession or sale in the original package was thereby secured. The view of the Court of Appeals apparently was that the Lacey Act granted to states the power to modify or to nullify the implication contained in a federal tariff regulation.

The case was appealed to the United States Supreme Court. The particular question at issue—state interference with the possession or the disposal of imported goods in the original package constituting a legitimate article of commerce upon which duties had

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divesting section did not convey this thought clearly. On its face it subjected to state control the dead bodies of foreign game animals, or game or song birds, "the importation of which is prohibited." See *supra*, p. 119, note 15. To hold that the Lacey Act subjected to state control traffic in the dead bodies of game birds and animals prohibited entry into the United States by federal regulations would make its terms practically meaningless in enlarging state power over shipments from abroad; but this appeared to be the plain import of the language used. A similar construction was placed upon this part of the divesting section in an opinion given to the Treasury Department by the United States Attorney General soon after the passage of the act. 23 *Ops Atty. Gen.* 213 (1900).

<sup>24</sup> *Silz v. Hesterberg*, 184 N. Y. 126, 76 N. E. 1032 (1906)

<sup>25</sup> *Ibid.*, pp. 133, 1034.

been paid—had not yet been clearly involved in any case arising under the Wilson Act.<sup>26</sup> Restriction of the application of that statute through judicial interpretation afforded strong ground for expectation that similar limiting principles might be established in the interpretation of the Lacey Act. The wording of the latter act seemed, moreover, to sanction the enforcement of state laws only upon the bodies of game birds and animals prohibited entry under federal regulations.

The expectation of a narrow construction of the Lacey Act proved ill-founded. The ruling of the New York Court of Appeals was sustained,<sup>27</sup> but not upon the grounds stated in its opinion. Instead of admitting the interference with foreign commerce and relying upon the divestment clause to justify the state restraint, the Supreme Court chose rather to adopt a view of the state police power sufficiently broad to sustain the state law independently of any federal authorization.

The Court admitted that the game in question could be considered a legitimate article of foreign commerce; that it was so considered in the terms of federal tariff regulations; and that the tariff statute set up an inference in favor of the right to import such goods free from state interference. But there was an opposing principle, the peculiar interest of the state in the preservation and protection of its wildlife. By virtue of this principle power existed in the state to grant only a conditional right of private ownership in game, as held in the *Geer* case. Interference with interstate or foreign commerce resulting from state prohibition or restriction of possession or sale of game during the close season was "only incidental" to a proper exercise of the state's police power. The purpose of the state game law was not to regulate commerce, but by

<sup>26</sup> Cf. *De Bary and Co. v. Louisiana*, 227 U. S. 108 (1913), *supra*, p. 105. In this case the Supreme Court held that a local license tax upon dealers in liquors applied to dealers engaged in selling imported liquors in the original package. It thus ascribed to the Wilson Act the effect of removing the barrier to exercise of state power set up by federal tariff regulations and by the conditional restraint upon the states in the levying of duties upon imports which the Court had held to be controlling in *Brown v. Maryland* and *Low v. Austin*. This was the purpose intended to be accomplished by the Frye Bill, brought forward in the Senate prior to the enactment of the Wilson Act, but abandoned after an adverse report on its constitutionality by the Senate Judiciary Committee. See *supra*, p. 82.

<sup>27</sup> *Silz v. Hesterberg*, 211 U. S. 31 (1908). The opinion was given by Justice Day.

rules applicable alike to foreign and domestic game "to protect the people of the state in the right to use and enjoy the game of the state." <sup>28</sup> Since the power in question was therefore included within the police power of the state, independently of any provision of federal law, the Court found it unnecessary to examine the provisions of the Lacey Act to support its finding.

In thus reaching its conclusion upon the basis of a broad view of the police powers of the states the Court avoided placing itself in the awkward position of acknowledging that Congress, by the Lacey Act, had permitted the states to modify a federal statute. It avoided a construction of the peculiar language of the statute in reference to imports. It likewise avoided the necessity of following the principles already laid down in connection with the Wilson Act in determining the limits of state power under the divestment law applying to game. Possibly the Court realized that, if reliance was placed upon the federal statute, the Lacey Act would have been rendered as ineffective as the earlier statute in achieving a release of state power. For the Court to take the position it did was no doubt fortunate for the cause of wildlife conservation; but it achieved this proper result through a ruling that represented a remarkable amendment of earlier judicial statements on the power of states in their own right to interfere with the sale of goods in the original package.

It is difficult to harmonize the view set forth in this case with the principles upheld by the Court in *Brown v. Maryland* and *Leisy v. Hardin*. In *Silz v. Hesterberg* the Court faced a question of state interference with the free disposal of a legitimate article of commerce, not inherently dangerous or offensive in itself, but, on the contrary, an article highly valued as food. Yet the prohibition of possession or sale of game, even when imported in accordance with federal statutes, was regarded as only an "incidental" and "indirect" interference with commerce. It is difficult to see how prohibition of possession or sale of a legitimate article of commerce can constitute a direct burden upon commerce in one instance, but not in another. A state police power that *was* restrained from prohibiting a sale of beer introduced from another state by reason of an implication drawn from the silence of Congress was *not* restrained from interfering with the disposal of game, an article inoffensive in itself

<sup>28</sup> *Ibid.*, p. 43.

and imported under the sanction of a Congressional statute. The fact that there was no attempt to discriminate against out-of-state trade in the adoption of state prohibition of the sale of intoxicating liquor carried no weight when the Court was considering the question of the resulting interference with the interstate traffic; nor had the fact that such legislation was obviously enacted for other purposes than commercial advantage. Yet these were facts taken into account by the Court when the same points were presented in a case involving state prohibition of the possession and sale of game.

Due judicial notice was taken of the *purpose* of game-conservation legislation, and the *effect* of such legislation upon commerce was treated as incidental. The proprietary interest of the state in its game overrode all other considerations. Yet in the case of prohibitory liquor legislation the *effect* upon interstate commerce was the controlling factor. The *purpose* of that legislation was ineffective to save it from invalidity under the commerce clause. The Court placed itself in the rather indefensible position of showing greater consideration for the right of a state to protect its wildlife from destruction than for its right to protect its citizens against the evils of the liquor traffic. The Court avoided an open acknowledgment that the Congressional statute influenced its judgment in this case; but even though the Court refused to acknowledge the fact, the divestment provision may actually have been taken into account by it in reaching its conclusion.

No rulings illustrate more clearly than these involving commerce in liquor and game the uncertainty of the result in judicial determination of the limits of state authority to restrain interstate and foreign commerce. What the Court actually did in the two instances was to measure national and state interests against each other. With reference to intoxicating liquors national commercial interests were of sufficient importance in the judgment of the Court to warrant imposition of a check upon state action, subject to possible reversal by Congress. With reference to game national commercial interests were not sufficiently involved to impel the Court to take this action. The proprietary interest of the state was predominant enough to justify an interference with national commercial interests.<sup>29</sup> Relying upon the principles enunciated in

<sup>29</sup> The ruling in *Foster-Fountain Packing Co. v. Haydel*, 278 U. S. 1 (1928), indicates that commercial interests can be sufficiently important in the Court's judgment to cause the commerce clause to operate as a restraint on the power of

the *Leisy* opinion Congress anticipated an adverse holding by the Court on the question of state power to interfere with commerce in game and proposed to forestall this result by the adoption of the Lacey Act. Eventually, Congress discovered it had erred in guessing what the Supreme Court would hold its failure so to act would have meant. Unable to foretell what the attitude of the Court would be on the question of the relative importance of commercial interests and conservation needs, Congress could only assume that the Court would carry to a logical conclusion the principles endorsed by it in *Leisy v. Hardin* and *Brown v. Maryland*.

The divesting section of the Lacey Act received no further consideration by the Supreme Court beyond that indirectly given it in *Silz v. Hesterberg*. This section has been relied upon to some extent by state courts in sustaining state game laws in reference to interstate commerce. Such judicial construction as it has received in state courts has not been wholly in accord with the decisions of the Supreme Court in connection with the similarly worded Wilson Act. As has been indicated above, the New York courts relied upon it to justify their reversal of opinion on the question of the validity of state game laws in reference to possession and sale of game of extrastate origin. The courts of that state followed the principle laid down by the Supreme Court in interpreting the Wilson Act by holding that state authority did not attach to shipments of game upon entry into the state so as to make penalties against transportation applicable to an interstate carrier. As in the *Rhodes* case, state power was held to attach only after arrival of goods at their destination.<sup>30</sup> But this principle was not extended to the point of protecting an importer in the right to introduce and hold game for his own use, as had been done under the Wilson Act.

In one state court the divesting section of the Lacey Act was held to justify the seizure of shipments of game by state authorities when the seized shipments consisted of game lawfully killed in other states and destined for delivery in states where their entry was not prohibited.<sup>31</sup> In sustaining such action by Arkansas authorities the

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a state to make and enforce "conservation" measures actually designed to secure local economic advantage.

<sup>30</sup> *People v. Fargo*, 122 N. Y. S. 553 (S. Ct., App. Div.) (1910), reversing the same, 118 N. Y. S. 454 (S. Ct.) (1909).

<sup>31</sup> *Wells Fargo Express Co. v. State*, 79 Ark. 349, 96 S. W. 189 (1906).

Supreme Court of that state candidly averred that Congress by the Lacey Act "conferred" upon the states a power, not theretofore possessed, of making operative their game laws on game brought into the state. The court failed to note that by the terms of the act the power thus "conferred" had been limited in application to shipments destined for sale, use, or storage within the state of destination. There had been no intent to authorize state law-enforcement officials to seize goods in transit if their points of origin and destination both lay outside the state attempting the seizure. Since the interference with commerce in this case was obviously more than "incidental" the court evidently felt the need for a stronger basis for sustaining the action of local authorities than was afforded in the police power of the state unsupported by federal consent; hence the summoning up of the Lacey Act clause to bolster the conclusion.<sup>32</sup>

Though there were these instances of reliance upon the divestment section of the Lacey Act to justify the extension of state authority to interstate and foreign commerce in game, upon the whole it proved to be of slight importance in this sense. The liberal view of the Supreme Court in *Sulz v. Hesterberg* and *Geer v. Connecticut* on the question of the scope of state police power has made unnecessary a resort to the federal statute to validate state control of such commerce.<sup>33</sup> The repeal of the divesting section

<sup>32</sup> Cf. *People v. Booth Fisheries Co.*, 253 Ill. 423, 97 N. E. 837 (1912), *infra*, p. 127, note 38

<sup>33</sup> Lower courts have generally sustained state laws prohibiting possession or sale of game in regard to game shipped into the state without relying upon the Lacey Act. See *In re Deininger*, 108 F. 623 (Cir. Ct., D. Ore.) (1901), *In re Schwartz*, 119 La. 290, 44 S. 20 (1907); *People v. Waldorf-Astoria Hotel Co.*, 103 N. Y. S. 434 (S. Ct., App. Div.) (1907). In *State v. Shattuck*, 96 Minn. 45, 104 N. W. 719 (1905), a state statute prohibiting possession of game was upheld in regard to game shipped into the state. The Court considered the state law involved to be a proper police-power measure, but added that in any event the Lacey Act had "eliminated" any question of interference with interstate commerce. Similar language was used in *State v. Hager*, 194 Mo. 707, 97 S. W. 259 (1906), and *Cohen v. Gould*, 177 Minn. 398, 225 N. W. 435 (1929). No reference was made to the Lacey Act in *State v. Nelson*, 146 Wash. 17, 261 Pac. 796 (1927), sustaining the applicability of a state law to an interstate shipment of game.

On the other hand, in *Acklen v. Thompson*, 122 Tenn. 43, 126 S. W. 730 (1909), the Supreme Court of Tennessee refused to hold state legislation prohibiting possession of the plumage, skins, or bodies of game birds applicable to birds killed outside the state. The commerce clause was set up as a barrier. Although the case was one coming clearly within the Lacey Act, no mention of the federal law was made in the court's opinion.

would probably have little effect upon the authority of the states to prohibit commerce in the bodies of game birds and animals. State restriction of such commerce has the implied approval of the federal government not only in the divesting section of this act, but also in other measures which have been adopted by Congress to prohibit commerce in game killed or shipped in violation of state or federal regulations.<sup>34</sup>

In 1926 Congress saw fit to give further aid to the states in game conservation by legislation closing the channels of interstate commerce to shipments of black bass taken in violation of state laws. The 1926 law,<sup>35</sup> although modeled upon the Lacey Act, did not contain a divesting section. As in the earlier legislation, there was a failure to provide the necessary enforcing machinery. This defect led to the passage of an amendatory act in 1930.<sup>36</sup> At the insistence of the House Committee on Interstate and Foreign Commerce a section was at that time added to the Black Bass Act applying the divestment principle to shipments of this species of game fish.<sup>37</sup> Some state courts had previously raised a question concerning the applicability of state laws to interstate shipments of game fish.<sup>38</sup>

<sup>34</sup> A discussion of this aspect of federal regulation of commerce in game is given *infra*, pp 308-315

<sup>35</sup> Act of May 20, 1926, 44 Stat. 576.

<sup>36</sup> Act of July 2, 1930, 46 Stat. 845. The act as amended is now found in 16 *United States Code* (1934), secs. 851-855.

<sup>37</sup> See c 801, sec. 4, 46 Stat. 846, 16 *U. S. C. A.*, sec 852b. The Senate bill providing the necessary enforcement provisions for the earlier act was introduced by Senator Hawes, of Missouri. It passed the Senate without change. The House Committee on Interstate and Foreign Commerce rewrote these enforcing sections, adding the divestment section. The bill was passed in the form recommended by the House Committee. There was no discussion of the divestment section on the floor in either house, the only comment on it being that of the House Committee Report, which merely stated that it was "similar to that in the Lacey Act and other existing legislation." *H. Rept.* 1610, 71st Cong., 2d Sess.

<sup>38</sup> Doubts concerning the power of a state to control importations of fish protected by state law had been expressed by the highest state court of review in two instances. In *People v. Booth Fisheries Co.*, 253 Ill. 423, 97 N. E. 837 (1912), the Supreme Court of Illinois upheld a conviction for violation of the state game law in reference to a sale of game fish lawfully taken in Canada and Minnesota and shipped into the state. The court maintained, however, that the state might not prohibit bringing such game fish into the state for personal consumption, or their removal from the state. The court made no mention of the Lacey Act, but cited for authority the Supreme Court's ruling in the *Hesterberg* case. In *White v. State*, 93 Fla. 905, 113 So. 94 (1927), the Supreme Court of Florida construed a state act prohibiting possession of mullet under specified size to be applicable only to fish taken in the state, and expressed doubt con-



The action of Congress in this instance was evidently designed to eliminate any doubt on the point, and thus to assist the states in their efforts to protect such game fish. No cases have arisen in state or federal courts involving this divesting provision of the federal statutes. Since the opinion of the Supreme Court in the *Hesterberg* case seems to settle the issue conclusively it is unlikely that this section will have any more significance as an extension of state authority than the Lacey Act has had.

## 2. OLEOMARGARINE AND BUTTER PRODUCTS

THE question of extending the divestment formula of the Wilson Act to oleomargarine and other substitutes for dairy products was agitated in Congress for over a decade, beginning in 1890. Although legislation of this character was eventually enacted in 1902, it proved to be of little or no consequence in extending state authority beyond the limits already set by the Supreme Court. It merely guaranteed retention by the states of powers already conceded to them by the Court. Nevertheless, the battle over the passage of a divestment act applying to these commodities is of considerable significance in illustrating the issues and the competition of interests which may be involved in this type of legislation.

Regulation of the manufacture and sale of oleomargarine became a matter of general concern to the states in the decade of the 1880's. After the introduction of the manufacture of this commodity in the United States about 1873,<sup>39</sup> its use as a butter substitute grew rapidly. Dairy interests, charging that the new product contained harmful and impure ingredients and that the public was being defrauded through sale of the cheaper commodity as butter, besought their state legislative bodies and Congress for regulative

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cerning the power of the state to prohibit possession of fish taken elsewhere. No mention was made of the Lacey Act. It is possible that this ruling may have influenced the inclusion of the divesting section in the amendatory act of 1930.

On the other hand, the Appellate Division of the New York Supreme Court held that the state game law prohibiting possession of game fish during the close season applied to fish imported from abroad, by virtue of the divestment section of the Lacey Act. *People v. A Booth and Co.*, 93 N. Y. S. 425 (S. Ct., App. Div.) (1905), reversing the same, 86 N. Y. S. 272 (S. Ct.) (1903).

<sup>39</sup> The development of the oleomargarine industry in the United States is described by William R. Pabst, Jr., in *Butter and Oleomargarine: An Analysis of Competing Commodities*, Columbia University Studies in History, Economics and Public Law, No. 427 (1937), Chap. I.

legislation. The resulting state legislation took the form of acts prohibiting the manufacture and sale of oleomargarine if colored to resemble butter, or requiring it to be colored in some distinctive way to prevent deception of the public. Later, when these measures proved ineffective, some states undertook to prohibit its manufacture and sale completely.<sup>40</sup>

The assistance of Congress in controlling the manufacture and sale of the new product was secured in 1886 by the passage of the Hatch Act.<sup>41</sup> This law placed the manufacture and distribution of oleomargarine under federal regulation to insure protection of the public. It set a limit on the size and required the marking of packages of the article when shipped in interstate commerce; imposed an excise tax of two cents a pound upon its manufacture; and placed heavy license taxes upon manufacturers, wholesalers, and retailers.

These legislative attempts to restrict the manufacture and sale of oleomargarine met with strong resistance from the manufacturing and commercial interests affected. Every possible constitutional ground for overthrowing the restrictive state statutes was tested. A substantial victory for the advocates of regulation came with the validation of a Pennsylvania statute of 1885 placing an absolute ban upon the manufacture of oleomargarine in that state.<sup>42</sup> Oleomargarine manufacturers and dealers, having lost the major battle over state restriction of production, followed the example of the liquor interests by next seeking to establish immunity from state control by resort to the commerce clause and the original-package doctrine. Since the shipment of this commodity in interstate commerce had been brought under federal regulation in certain respects by the Hatch Act, an argument could be derived

<sup>40</sup> The first state regulative acts were passed in New York and Pennsylvania in 1877. By 1900 thirty-two of the forty-five states had passed laws restricting in one way or another the manufacture and sale of oleomargarine. A digest of this legislation may be found in *Cong. Rec.*, 56th Cong., 2d Sess., pp. 135-136.

<sup>41</sup> Act of Aug. 2, 1886, 24 Stat. 209.

<sup>42</sup> *Powell v. Pennsylvania*, 127 U. S. 678 (1888). In this case the Supreme Court followed its ruling in *Mugler v. Kansas*, 123 U. S. 623 (1887), wherein it had upheld the power of a state to prohibit the manufacture of intoxicating liquor against a claim of interference with rights under the Fourteenth Amendment. In *Capital City Dairy Co. v. Ohio*, 183 U. S. 238 (1902), the power of a state to prohibit the manufacture of oleomargarine colored to resemble butter was upheld against objections based upon the Fourteenth Amendment and the commerce clause.

therefrom against any further regulatory measures by the states respecting possession or sale of oleomargarine in the original package. It could be argued not only that the federal regulations set up the presumption that Congress had recognized oleomargarine as a legitimate subject of manufacture and commerce, but also that federal laws provided a complete and exclusive regulation on the matter of shipment. A right to introduce and sell oleomargarine in the original package was therefore to be implied from the federal statute. On the other hand, it could be shown on this point that by reference Congress had included in the Hatch Act existing provisions of the revenue laws relating to liquors, through which the intention to license the manufacture and sale of the subject of taxation in contravention of state laws was expressly disclaimed.<sup>43</sup> From this it could be argued that federal shipping and manufacturing regulations were not designed to prevent the application of state police-power regulations upon oleomargarine.

Judicial decisions prior to the Supreme Court's ruling in the *Leisy* case supported state authority to restrict or prohibit the sale of oleomargarine against the contention of interference with interstate commerce.<sup>44</sup> The trend of these decisions changed after the announcement of the opinion of the Supreme Court in *Leisy v. Hardin*. Accepting that ruling as controlling, lower courts construed much more strictly the police powers of the states in reference to prohibition of the sale of oleomargarine in original packages. Dealers in oleomargarine against whom attempts were made to enforce state restrictive statutes were successful in establishing a "constitutional" right to dispose of their products in the

<sup>43</sup> R. S., secs. 3232-3241, 3243 (1878)

<sup>44</sup> In *State v. Addington*, 77 Mo. 110 (1882), a state statute prohibiting the manufacture and sale of oleomargarine was sustained against a contention that it violated rights under the commerce clause. The court took the position that the regulation was valid, even if it interfered with interstate commerce, so long as there was no conflict with express regulations by Congress. In the case of *In re Brosnahan*, 18 F. 62 (Cir. Ct., W. D. Mo.) (1883), the same statute was under consideration. The court upheld the act against the contention that it was in conflict with the commerce clause, but indicated that if the law "was directed by way of discrimination against products of a sister state, or prevented buying and selling between the states, or importation and exportation, it might well be held void." After Congress had passed the Hatch Act, it was held in *State v. Newton*, 50 N. J. Law 534, 14 Atl. 604 (1888), that the power of the state extended to the prohibition of original-package sales of oleomargarine; but the court acknowledged that it made the ruling with much misgiving since the position of the Supreme Court on the question had not yet been made clear.

original package.<sup>45</sup> These rulings resulted in the inauguration of a movement in Congress to subject original-package sales of oleomargarine to state control. Before the movement succeeded the Supreme Court was given opportunity to state its position on the question of the authority of the states to apply their laws to interstate traffic in this commodity. The rulings of the Supreme Court sanctioned in some degree the extension of state regulations to interstate sales, but they did not resolve the issue so clearly or so satisfactorily as to bring to an end the efforts to secure divesting legislation by Congress.

The first pronouncement of the Supreme Court came in 1894. A Massachusetts law passed in 1891 forbade the manufacture, the possession with intent to sell, or the sale of oleomargarine colored in imitation of yellow butter. A proviso saved the right to manufacture and sell uncolored oleomargarine if produced in a separate and distinct form and offered for sale in such a way as to advise the purchaser of its real character. A retail dealer licensed under federal law was convicted for selling artificially colored oleomargarine introduced from another state and sold in the original package.<sup>46</sup> Upon review of the case the United States Supreme Court found the state competent to prevent such sales under its police power, although the action was one involving an interference with interstate commerce.<sup>47</sup> The Court divided sharply on the basic issue, however.<sup>48</sup>

On the point of state interference with interstate commerce two arguments were advanced by the plaintiff in error: (1) that the state statute was in conflict with the regulations imposed by Con-

<sup>45</sup> *In re Worthen*, 58 F. 467 (Cir. Ct., S. D. Ohio) (1891); *In re McAllister*, 51 F. 282 (Cir. Ct., Md.) (1892), *In re Gooch*, 44 F. 276 (Cir. Ct., Minn.) (1890). See also *Waterbury v Egan*, 23 N. Y. S. 115 (City Ct., N. Y.) (1893).

<sup>46</sup> Reported under the title *Commonwealth v. Huntley*, 156 Mass. 236, 30 N. E. 1127 (1892). The report covers the cases of two dealers, Huntley, whose offense was a sale of oleomargarine in broken packages, and Plumley, who was charged with a sale of oleomargarine in the unbroken original package. In both instances the oleomargarine was shipped into Massachusetts from another state. Two of the seven members of the state court dissented in Plumley's case, maintaining that the principle of *Leisy v. Hardin* was controlling. Only Plumley's case was taken to the Supreme Court for review.

<sup>47</sup> *Plumley v. Massachusetts*, 155 U. S. 461 (1894). The opinion of the Court was given by Justice Harlan.

<sup>48</sup> Chief Justice Fuller delivered a minority opinion, concurred in by Justices Field and Brewer.

gress in the Hatch Act respecting transportation and sale of oleomargarine in the original package; and (2) that the statute imposed a direct burden upon interstate commerce in a legitimate article of trade, and was therefore invalid under the principles laid down in *Leisy v. Hardin*. The Court disposed of the first of these contentions by pointing out that the inclusion by reference of the saving clauses of statutes relating to the liquor traffic indicated clearly that Congress had not intended in any sense to limit state police power in the regulation of the manufacture and sale of oleomargarine.<sup>49</sup>

More difficulty was encountered in distinguishing the circumstances of this case from those of *Leisy v. Hardin*. This the Court achieved by pointing out that the oleomargarine statute was directed only against an article offered for sale in a form which would further the perpetration of a fraud upon the purchaser. In cases involving intoxicating liquors there had been lacking this element of potential fraud.<sup>50</sup> This was the central fact which justified the allowance of state police power to operate against subjects of interstate commerce in the one instance although not in the other. The commerce clause of the Constitution did not "secure to anyone the privilege of defrauding the public."<sup>51</sup>

Chief Justice Fuller, speaking for the minority, took a much narrower view of the state's police power under the commerce clause. The point was emphasized that the question of conflict with the exclusive federal power should be determined, not solely by the *purpose* of the state legislation, but by its "natural and reasonable effect."<sup>52</sup> Since federal legislation had undoubtedly recognized oleomargarine as a legitimate subject of commerce, the state was restrained from imposing any burden upon it while it retained character as an article of commerce, even for such a purpose as preventing fraud in its sale.<sup>53</sup> The suggestion was made, however, that, if Congress wished, it might "allow" the states to regulate commerce in oleomargarine, presumably by the method already employed in regard to intoxicating liquors.<sup>54</sup>

<sup>49</sup> *Plumley v. Massachusetts*, 155 U. S. 461, 466 (1894).

<sup>50</sup> *Ibid.*, p. 474.

<sup>51</sup> *Ibid.*, p. 479.

<sup>52</sup> *Ibid.*, p. 480.

<sup>53</sup> *Ibid.*, p. 481: "I deny that a State may exclude from commerce legitimate subjects of commercial dealings because of the possibility that their appearance may deceive purchasers in regard to their qualities."

<sup>54</sup> *Ibid.*, p. 480.

The *Plumley* decision established the validity of state legislation which was directed solely against the sale of oleomargarine colored to resemble butter. But some states had gone further than this in their regulatory policy. Unsuccessful in reaching its objective by milder regulations, Pennsylvania in 1885 had prohibited absolutely the manufacture and sale of all oleomargarine, whether colored to resemble butter or not; and other states, including New Hampshire, Vermont, and West Virginia, had enacted laws requiring that all oleomargarine offered for sale be colored pink. Four years after the *Plumley* decision two cases testing the validity of these forms of state regulation in the light of the commerce clause came before the Supreme Court.

The first arose from an attempt to enforce the prohibitory Pennsylvania statute in respect to an original-package sale of oleomargarine introduced into that state from Rhode Island. Although the licensed dealer who made the sale had informed the purchaser of the true character of the goods sold, he was nevertheless convicted in the state trial court. The conviction was sustained by the Supreme Court of the state.<sup>55</sup> The court not only held that the *Plumley* and *Powell* rulings covered the question of the authority of the state to prevent such sales, but also developed at some length the proposition that the original-package doctrine of the *Leisy* case should be limited in application to wholesale exchanges of goods.<sup>56</sup>

Review of the case by the Supreme Court of the United States resulted in a reversal of this ruling.<sup>57</sup> The Court was careful to

<sup>55</sup> *Commonwealth v. Schollenberger*, 170 Pa. St. 296, 33 Atl. 85 (1895). The opinion in the case is given in *Commonwealth v. Paul*, 170 Pa. St. 284, 33 Atl. 82 (1895). The statute involved was the same one upheld in *Powell v. Pennsylvania*, 127 U. S. 678 (1888) (see *supra*, p. 129, note 42), but in that case the issue was solely the right of the state to prohibit manufacture of oleomargarine.

<sup>56</sup> *Commonwealth v. Paul*, 170 Pa. St. 284, 292-293. The theory that the original-package doctrine should not be extended to protect sales at retail had previously been advanced by this court in *Commonwealth v. Schollenberger*, 156 Pa. St. 201, 213, 27 Atl. 30, 31 (1893). In that opinion the court severely criticized the *Leisy* ruling, pointing to the numerous instances in which dealers in questionable articles had seized the advantage offered by it to violate state police-power legislation by introducing and selling products detrimental to the public welfare. In this modification of the original-package rule it hoped to point the way to judicial circumvention of *Leisy v. Hardin* as an obstacle to state authority.

<sup>57</sup> *Schollenberger v. Pennsylvania*, 171 U. S. 1 (1898). Justice Gray offered a dissenting opinion, which was concurred in by Justice Harlan. The position of the minority was that the legislature of the state should have a free hand in

distinguish the circumstances from those of the *Plumley* case. Justice Peckham, who wrote the opinion, conceded that the state police power might cover the enactment of legislation to prevent fraud upon the public, even to the extent of interfering with the introduction and sale of articles of interstate commerce. But such legislation to be valid must be "fairly necessary" to accomplish this end. It must be limited to the sale of articles offered in a form likely to deceive the public. The principle of the *Plumley* case could not be carried to the point where the state would be permitted to regulate or prohibit the introduction of *all* oleomargarine. The suggestion that the force of the original-package doctrine be limited to wholesale transactions was not regarded with favor. The right of sale was contingent upon a right to introduce in the original package; this right could not be made to depend upon whether the original package was suitable for retail trade or not.<sup>58</sup> The Court intimated, though not so clearly as in the *Leisy* opinion, that Congress might submit this incidental right of sale to state regulation.<sup>59</sup>

At the same time that the *Schollenberger* case was decided the Supreme Court also held unconstitutional in reference to interstate shipments a New Hampshire oleomargarine law which required all oleomargarine offered for sale in the state to be colored pink.<sup>60</sup>

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legislating to protect the public against fraudulent sales. They insisted that, if it was the judgment of the legislature that the prohibition of all sales was necessary to protect the public interest, the Court should not presume to overrule them in the matter.

<sup>58</sup> *Ibid.*, p. 24. Soon afterward the Court in effect modified the original-package rule in favor of state authority by holding that packages of cigarettes suitable for retail trade shipped in loose form were not "original packages" under the protection of the commerce power. See *Austin v. Tennessee*, 179 U. S. 343 (1900), and *Cook v. County of Marshall*, 196 U. S. 261 (1905). It thus defeated attempts by tobacco dealers to escape state taxation and regulation of retail sales. In so doing the Court adopted in a limited sense the theory brought forward by the Pennsylvania Supreme Court.

<sup>59</sup> After reviewing the circumstances giving rise to the Wilson Act the Court concluded that, "in the absence of Congressional legislation [similar to that in the Wilson Act], therefore, the right to import a lawful article of commerce from one State to another continues until a sale in the original package in which the article was introduced into the State." *Schollenberger v. Pennsylvania*, 171 U. S. 1, 23 (1898).

<sup>60</sup> *Collins v. New Hampshire*, 171 U. S. 30 (1898). Gray and Harlan, JJ., also dissented in this decision. Prior to this ruling the applicability of "pink-coloring" statutes to interstate sales had been sustained in a number of opinions rendered by state and federal courts. See *State v. Collins*, 67 N. H. 540, 42 Atl.

Such regulation was held to be essentially similar to the direct prohibition condemned in the Pennsylvania statute. The coloring requirement so effectively discouraged the use of the article as to constitute a direct burden upon all commerce in it.

The decisions of the Supreme Court in the three oleomargarine cases left lower courts in some confusion concerning the limits upon state police power to control interstate sales of oleomargarine. In some jurisdictions the courts considered the principle of the *Plumley* case not to have been affected by the later rulings. They accordingly continued to uphold, in reference to interstate original-package sales, the enforcement of state laws prohibiting the sale of oleomargarine colored to resemble butter.<sup>61</sup> Other courts adopted the view that *Schollenberger v. Pennsylvania* and *Collins v. New Hampshire* overruled *Plumley v. Massachusetts* and denied power to the states to restrict or prohibit interstate sales.<sup>62</sup> The Supreme Court of New Hampshire, when confronted with another case involving the state's "pink-coloring" law, affirmed its constitutionality under the state constitution; but, citing the apparently conflicting opinions of the Supreme Court, it refused to pass on the federal question at issue.<sup>63</sup>

Opportunity for clarification of the position of the Supreme Court on the validity of pink-coloring statutes was given by appeals in two of these cases. The resulting rulings brought no further elucidation of the views of the Supreme Court on the question.<sup>64</sup>

52 (1894) (the ruling reversed by the Supreme Court), *State v. Myers*, 42 W. Va. 822, 26 S. E. 539 (1896), *Armour Packing Co. v. Snyder*, 84 F. 136 (Cir. Ct., D. Minn.) (1897).

<sup>61</sup> *In re Scheulin*, 99 F. 272 (Cir. Ct., E. D. Mo.) (1900); *State v. Rogers*, 95 Me. 94, 49 Atl. 564 (1901).

<sup>62</sup> *In re Brundage*, 96 F. 963 (Cir. Ct., Minn.) (1899). In *Fox v. State*, 89 Md. 381, 43 Atl. 775 (1899), and *McAllister v. State*, 91 Md. 290, 50 Atl. 1046 (1902), the Supreme Court of Maryland took the position that the state lacked power to interfere with interstate sales of colored oleomargarine unless the product could be shown to contain deleterious substances.

<sup>63</sup> *State v. Collins*, 70 N. H. 218, 45 Atl. 1080 (1900).

<sup>64</sup> In *Minnesota v. Brundage*, 180 U. S. 499 (1901), the Supreme Court reversed *In re Brundage*, 96 F. 963 (1899), setting aside an injunction issued against the enforcement of a Minnesota pink-coloring statute in reference to interstate sales. The reversal was based upon procedural grounds not touching the issue of interference with interstate commerce.

In *Collins v. New Hampshire*, 187 U. S. 636 (1902), the second case of this title involving the pink-coloring statute of that state, the judgment of the state court upholding the law as applied to an interstate sale of oleomargarine colored to resemble butter was affirmed. The case presented a peculiar difficulty in the



The inference appears warranted that the Court itself was so divided on the matter of the degree to which the states might be allowed to interfere with interstate commerce in oleomargarine to prevent deception of the public that a definitive pronouncement could not be agreed upon. Apparently the Court was split into three groups on the question. A middle group held that, while a state under its police power might prohibit the introduction and sale of oleomargarine colored to resemble butter, it could not carry its regulation to the point where the sale of uncolored, unadulterated oleomargarine in original packages was impeded. On the "right" were the minority in the *Plumley* case, who maintained that state interference with original-package sales under the guise of protecting the public from fraud was unwarranted in any circumstance, without the consent of Congress. On the "left" were the minority in the *Schollenberger* and *Collins* cases, who insisted that any measures adopted by a state legislature for protection of the public against fraud were permissible, even to the point of absolute prohibition of all sales. Uncertainty arose in deciding whether acts falling clearly within the prohibitory power of the state under the *Plumley* ruling might be reached by state laws that included within their sphere of condemnation matters which the state could not reach according to the *Schollenberger* ruling.

Owing to the manner in which the Court was divided on the issue neither side interested in state regulation of the oleomargarine traffic could feel assured that a change of judicial personnel might not expose its interests to unrestricted state regulation on the one hand or make impossible an effective policy of state regulation on the other. In view of this uncertainty it was only to be expected that organizations and forces interested in state regulation of the oleomargarine industry should have been busy attempting to obtain Congressional sanction for applying state regulative measures to interstate commerce in this product. At the same time opposing interests were equally active in trying to prevent this step, in the hope of conserving rights secured for the trade through judicial

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light of the earlier rulings. The article offered for sale was colored in such a way as possibly to cause deception, as in the *Plumley* case, yet the regulative statute was that involved in the first *Collins* case, which had been judged inoperative upon interstate sales. The difficulty with which the Court reached a conclusion is indicated by the fact that there were two rearguments of the issues. The case was eventually disposed of by an equal division of the Court, having the effect of affirming the ruling of the state court. No opinion was offered.

extension of the protective mantle of the commerce clause over it. The bitterness of the struggle was reflected in the fact that divesting proposals were passed on three separate occasions by the House before favorable action was obtained in the Senate.

Aligned generally in support of the proposal to subject oleomargarine to state control were members of Congress from states where powerful dairy interests clamored for legislation to protect the legitimate butter industry. Strong opposition came from those legislators who were responsive to the influence of the meat-packing industry and to certain farm interests, particularly in the South, whose products went into the manufacture of oleomargarine. Some opposition also was inspired by the attitude of wage-earning groups in the cities, who desired unrestricted sale of oleomargarine as a cheap substitute for butter.

The attempt in 1890 to broaden the terms of the Wilson Bill in the House to include any article of commerce, which was largely inspired by the desire to bring oleomargarine under state authority, has already been described.<sup>65</sup> Separate divesting bills relating to oleomargarine were also introduced in the Fifty-first and Fifty-second Congresses, but failed to be acted upon.<sup>66</sup> The *Plumley* decision did not cause a cessation of effort to secure federal legislation of this character. When that decision was rendered, a divestment bill introduced by Representative Grout of Vermont was pending in the House. It reached the discussion stage on the floor in the third session of the Fifty-third Congress. Although apparently commanding the support of a majority of the House, the bill was lost when its opponents took advantage of a parliamentary tangle at the end of the session to prevent its coming to a vote.<sup>67</sup> The Grout Bill attracted the support of the growing anti-oleomargarine forces, and it was eventually enacted as a part of a measure of more comprehensive nature.

<sup>65</sup> *Supra*, pp. 93-96.

<sup>66</sup> A divesting bill relating to oleomargarine was introduced in the Senate in the first session of the Fifty-first Congress by Senator Hiscock, of New York, at the time the Wilson Bill was under discussion in that body. The bill (S. 3911) was reported favorably from committee, but failed to be considered. In the Fifty-second Congress a bill (H. R. 4843) introduced by Representative Hatch, of Missouri, was reported favorably by the Committee on Agriculture, but failed to be considered. A bill (S. 2183) introduced in this Congress by Senator Davis, of Minnesota, was not reported out of committee.

<sup>67</sup> See *Cong. Rec.*, 53d Cong., 2d Sess., pp. 4906, 8339; *ibid.*, 3d Sess., pp. 910, 946.

Following closely the language of the Wilson Act, the Grout Bill proposed to subject to state control original packages of "all articles known as oleomargarine, butterine, imitation butter, or imitation cheese, or any substance in the semblance of butter or cheese not the usual product of the dairy and not made exclusively of pure and unadulterated milk or cream." Pointing out that the Supreme Court opinion in the *Plumley* case had conceded the power in question to the states, the sponsor of the bill explained that the measure would make no alteration in the limits of state police power. Its effect would be only to secure the principle of state control over imitation butter or cheese products as applied in that case. This ruling obviously rested upon a somewhat shaky foundation, since three members of the Court had delivered a strong dissent in which they denied that states might control the sale of imitation butter products for the purpose of preventing fraud.<sup>68</sup>

In the next Congress the Grout Bill was reintroduced. After a rather heated debate the measure received the approval of the House by a vote of 126 to 96.<sup>69</sup> The Senate failed to act upon it, although a favorable committee report was given.<sup>70</sup> Upon recommendation of the committee to which the bill was referred a slight change in the wording of the measure was made by the House. The original bill employed the phrase "upon arrival within such State" to mark the point where effective state control over original packages might begin to operate. Anticipating the narrow interpretation which the Supreme Court eventually gave to the corresponding phraseology of the Wilson Act in *Rhodes v. Iowa*,<sup>71</sup> the sponsor of the bill revised its wording, causing it to read "upon arrival within the limits of such State . . ." This change from the language of the Wilson Act was retained in subsequent drafts of the Grout Bill.

Prior to the meeting of the Fifty-sixth Congress the Supreme

<sup>68</sup> See the remarks of Representative Grout, *Cong. Rec.*, 53d Cong., 3d Sess., p. 915.

<sup>69</sup> The bill (H. R. 1221) was introduced by Representative Grout on December 10, 1895, in the first session of the Fifty-fourth Congress. It was reported favorably by the House Committee on Agriculture on March 31, 1896 (*H. Rept.* 1015, 54th Cong., 1st Sess.), but was not taken up for debate until the following session. See *Cong. Rec.*, 2d Sess., pp. 767 ff., 803 ff., for the House debate upon it.

<sup>70</sup> *S. Rept.* 1442, 54th Cong., 2d Sess.

<sup>71</sup> 170 U. S. 412 (1898); see *supra*, p. 107.

Court rendered its decision in the *Schollenberger* case, which raised some doubt whether the doctrine applied in the *Plumley* case had not been repudiated. Efforts to secure legislation from Congress to subject traffic in oleomargarine to state control were renewed. The Grout Bill was again brought forward in the House, but attached to it was an important additional section. The new section incorporated a proposal, originally contained in a bill introduced in the Fifty-fifth Congress by Representative Davidson, of Wisconsin, changing the existing two cents per pound excise tax on the manufacture of oleomargarine. By the new section there was proposed a ten cents per pound excise tax on the manufacture of oleomargarine colored to resemble butter, and a one-fourth cent a pound tax on the manufacture of uncolored oleomargarine. Although the *Schollenberger* decision had set up a substantial check upon states in dealing with interstate sales of oleomargarine, no attempt was made to broaden the scope of the divesting clause to overcome the effect of that decision. Divestment was to apply only to imitations of butter or cheese likely to lead to the practice of fraud upon the public.

The section proposing a change in the excise tax on oleomargarine proved to be of greater concern to the opponents of the bill than the divestment clause. Thereafter the debate related primarily to the tax feature, although objections continued to be made against the original divestment section. The revamped Grout Bill was passed by the House on December 7, 1900;<sup>72</sup> but after a skirmish in the Senate over the question of committee reference and a favorable committee report<sup>73</sup> the measure was submerged in the rush of bills at the end of the short session of the Fifty-sixth Congress.

In the next Congress increased pressure was brought to bear for the enactment of a federal law to protect further the public, and incidentally the dairy industry, against fraudulent sale of oleomargarine. A bill which embraced the provisions of the Grout Bill passed by the House in the preceding Congress was taken up in the

<sup>72</sup> *Cong. Rec.*, 56th Cong., 2d Sess., p. 186. The vote was 197 to 92.

<sup>73</sup> Senator Vest, a member of the Finance Committee, insisted that the bill was a revenue measure and should be referred to his committee. Reference was made over his opposition to the more favorably disposed Committee on Agriculture and Forestry. *Ibid.*, p. 214. The bill was reported favorably on January 26, 1901, by this committee (*S. Rept* 2043).

House.<sup>74</sup> In the course of deliberations an amendment offered by Representative Allen, of Kentucky, was added. The Allen amendment, which had little support from the anti-oleomargarine forces, proposed to levy license taxes upon the manufacture and sale of adulterated butter and imposed upon it inspection and shipping requirements similar to those required for oleomargarine.<sup>75</sup> As was to be expected, the bill weathered the attacks upon it in the House, and it was passed over to the Senate.<sup>76</sup>

This time favorable action by the Senate was obtained, but only after a concession had been made by supporters of the measure to extend its scope so as to include in both its taxing and regulative provisions "process, renovated and adulterated butter." Certain members of the Senate felt that these other products must also be brought within the scope of the regulations affecting oleomargarine if the subject of imitation dairy products was to be fairly and fully dealt with.<sup>77</sup> By further amendment these subjects were likewise included in the enumeration of commodities which were to be subjected to state control under the divestment formula.<sup>78</sup>

In its amended form the bill passed the Senate by a narrow margin on April 3.<sup>79</sup> The additional regulative features intro-

<sup>74</sup> H. R. 9206, 57th Cong., 1st Sess. The bill was sponsored by Representative Henry, of Connecticut, Representative Grout having been removed from the House by death.

<sup>75</sup> Representative Allen, who was an opponent of the Grout Bill, hoped in this way to strike at the dairy interests and to challenge the assertion of the supporters of the bill that their purpose was merely to protect the public against fraud. The Allen amendment was adopted by a vote of 152 to 126. *Cong. Rec.*, 57th Cong., 1st Sess., p. 1658

<sup>76</sup> *Cong. Rec.*, 57th Cong., 1st Sess., p. 1659.

<sup>77</sup> The Senate Committee on Agriculture, in reporting the bill, had left out the Allen amendment relating to adulterated butter. The new provisions relating to process, renovated, and adulterated butter were offered by Senator Harris, of Kansas, in an amendment from the floor. A system of inspection and shipping regulations similar to those for oleomargarine and other substitute dairy products was set up for these commodities, license taxes were imposed upon manufacturers and dealers; and a prohibitive excise tax of ten cents a pound was imposed upon the manufacture of adulterated butter, while process and renovated butter were to be taxed at the rate of one-fourth cent a pound. The Harris amendment was accepted by the sponsors of the Grout-Henry Bill, and they assisted in its perfection *Ibid.*, p. 3611.

<sup>78</sup> *Ibid.* The amendment extending the divestment provision to process, renovated, and adulterated butter was offered by Senator Proctor, of Vermont, who sponsored the bill in the Senate.

<sup>79</sup> *Cong. Rec.*, 57th Cong., 1st Sess., p. 3614. The vote on final passage in the Senate was 39 to 31.

duced into the bill by the Senate were so extensive that on its return to the House it was referred to the House Committee on Agriculture for consideration of the amendments. Upon recommendation by this committee the Senate amendments were agreed to with certain exceptions not pertaining to the divestment features. Agreement by the two houses on the remaining points of difference was eventually obtained, and the completed measure became law with the signature of the President on May 9, 1902.<sup>80</sup>

This legislation afforded opportunity for further expression of views in Congress on the question of the divestment power of Congress. A difference of opinion on the scope of the divestment section in the oleomargarine act tended, however, to obscure the issue. Supporters of the Grout Bill claimed that no alteration in the judicially accepted line marking the limits of state power over original packages in interstate commerce would result from the enactment of the measure. Their position was that the proposed measure was designed solely to place upon a legislative foundation the principle adopted by the Court in the *Plumley* case. They insisted that the measure would merely protect the right of a state to prevent sale of imitation butter and cheese products offered to the public in the semblance of the real articles. The advocates of the bill were therefore able to cite in support of the constitutionality of the measure not only the Wilson Act precedent, but also the ruling of the Supreme Court itself on the extent of the power of a state to protect the public against fraudulent sales.

Opponents of the bill were insistent that its language did not state clearly that divestment would be limited to substitutes in

<sup>80</sup> 32 Stat 193. The divesting section of the act, now found in 21 *United States Code* (1934), sec. 25, was as follows: "All articles known as oleomargarine, butterine, imitation, process, renovated, or adulterated butter, or imitation cheese, or any substance in the semblance of butter or cheese not the usual product of the dairy and not made exclusively of pure and unadulterated milk or cream, transported into any State or Territory or the District of Columbia, and remaining therein for use, consumption, sale, or storage therein, shall upon arrival within the limits of such State... be subject to the operation and effect of the laws of such State... enacted in the exercise of its police powers, to the same extent as though such articles or substances had been produced in such State... and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

The only significant difference in wording from the Wilson Act was the substitution of the phrase "arrival within the limits of" instead of "arrival in" to mark the point at which state power should become operative.

the semblance of real butter and cheese. They pointed out that the divestment provision of the bill applied to "all articles known as oleomargarine, butterine, imitation, process, renovated, or adulterated butter, or imitation cheese, or any substance in the semblance of butter or cheese not the usual product of the dairy and not made exclusively of pure and unadulterated milk or cream." The contention was that this definition included *all* oleomargarine in its scope, not merely oleomargarine "in the semblance of butter."

As an evidence of good faith in limiting the applicability of the divestment section to products offered as *imitations* of dairy butter and cheese the author of the bill suggested as an amendment to this section a proviso stating that divestment of the articles specified should not be construed to authorize the states to prevent the manufacture and sale of oleomargarine in a separate and distinct form, so long as it was free from coloration causing it to resemble butter. The proviso was accepted<sup>81</sup> and remained in the bill when it first passed the House. It was retained in the bills passed by the House in the Fifty-sixth and Fifty-seventh Congresses. The proviso was eventually stricken out by the Senate, however, when that body finally gave approval to the Grout-Henry Bill in 1902. This left the question of applicability to all oleomargarine as uncertain as it had been in the bill originally introduced.<sup>82</sup>

Because of this difference of opinion on the scope of the divestment section in relation to oleomargarine there was a failure to have an argument on the clear-cut question of the power of Congress to subject to state control a "legitimate" article of commerce, that is, uncolored oleomargarine. Holding that the purpose of the measure was to subject *all* oleomargarine to state control, opponents did not hesitate to attack it as an unconstitutional delegation of the commerce power to the states. They maintained that a "legitimate" article of commerce could not be subjected to state control

<sup>81</sup> *Cong. Rec.*, 54th Cong., 2d Sess., pp. 812, 814.

<sup>82</sup> The proviso was eliminated on recommendation of the Committee on Agriculture and Forestry in its report on the bill. According to Senator Dolliver, of Iowa, a member of the Committee, this action was taken because the proviso was unnecessary and might lead to controversy. He went on to say that "without the amendment nobody will be constrained in taking oleomargarine into States where the law permits its sale, provided the tax is paid, while with the amendment left in a question of construction may arise in which the rule of uniformity in the levy of taxes may be invoked to invalidate the whole statute." *Cong. Rec.*, 57th Cong., 1st Sess., p. 3273.

by divestment. Only commodities deemed inherently deleterious, such as intoxicating liquors, could be subjected to state police-power control in this manner.<sup>83</sup> They insisted that the Supreme Court's ruling in the *Plumley* case had given the states ample power to deal with the subject, so far as there was an element of potential fraud in the offering of it to the public in the guise of butter.<sup>84</sup> The *Schollenberger* and *Collins* decisions appeared to some members to justify the belief that the Court would not give effect to any act of Congress of the character proposed.<sup>85</sup> Even some supporters of the bill expressed the conviction that Congress could go no further than to remove federal protection from oleomargarine colored to resemble butter. They maintained, of course, that the bill simply

<sup>83</sup> See the remarks of Representative Williams, of Mississippi, *Cong. Rec.*, 54th Cong., 2d Sess., p. 768, Representative Boatner, of Louisiana, *ibid.*, p. 773, Representative Cooper, of Florida, *ibid.*, p. 803, and Representative Cannon, of Illinois, *ibid.*, p. 807.

During the first consideration of the Grout Bill in the House Representative Tucker, of Virginia, an opponent of the measure, moved an amendment to it which would make it applicable to "all articles of commerce." His point was that the commerce power and the state police power were entirely separate, and that Congress could not, by legislation, increase or diminish state police power in any degree. Hence a sweeping declaration by Congress, once and for all, would resolve all questions of this sort for the future. It would stop the "chopping-up" process by which Congress was relinquishing to the states their "rightful" police powers piece by piece. His amendment was defeated 88 to 23. *Cong. Rec.*, 54th Cong., 2d Sess., p. 810.

<sup>84</sup> When the Grout Bill was brought up for consideration the second time in the House seven members of the Committee on Agriculture submitted a minority report which urged the adoption of a substitute bill redefining the size of original packages in which oleomargarine should be shipped in interstate commerce so as to include what would ordinarily be retail-sale packages in the definition of original packages. They also proposed to strengthen the provisions of the federal law regarding the marking of original packages to disclose their true character. See *H. Rept.* 1854, 56th Cong., 1st Sess. The adoption of this substitute became the objective of the opposition to the Grout Bill. Their substitute was brought forward in minority committee reports in both the House and the Senate when action on the Grout Bill was finally secured in the Fifty-seventh Congress. These minority committee reports opposed the divestment feature of the Grout Bill on grounds of policy, but did not question its constitutionality.

<sup>85</sup> See the remarks of Representative Burleson, of Texas, *Cong. Rec.*, 57th Cong., 1st Sess., p. 1262. Others who questioned the power of Congress to legislate in this manner in respect to all oleomargarine were Representative Kleberg, of Texas, *ibid.*, p. 1311; Representative Clayton, of Alabama, *ibid.*, p. 1614 and p. 88 (App.); Representative Allen, of Kentucky, *ibid.*, p. 1351; Representative Brantley, of Georgia, *ibid.*, p. 1554, Senator Money, of Mississippi, *ibid.*, p. 3241; and Senator Bailey, of Texas, *ibid.*, p. 3509.



permitted the states to restrict original-package sales according to the principle of the *Plumley* ruling.<sup>86</sup>

The states have apparently proceeded upon the assumption that the federal law would not extend state powers over interstate traffic in oleomargarine further than had already been allowed by the Supreme Court. No attempts appear to have been made by the states subsequently to extend their restrictive statutes to uncolored oleomargarine in the original package. No cases involving the divestment section of the 1902 law have been brought to the attention of the Supreme Court, but lower courts have indicated that previous judicial rulings on the subject of state power over the interstate traffic were undisturbed by the federal legislation.<sup>87</sup> The Supreme Court has applied the principle of the *Plumley* case in connection with other state legislation designed to prevent the sale of adulterated or misbranded goods, and in so doing has cited that case with approval.<sup>88</sup> This would indicate that the divestment section of the Grout Act was unnecessary to sustain state authority to prohibit the sale of misbranded and artificially colored oleomargarine, and that the 1902 act was merely confirmatory of the Court's views on this point.

This legislation failed, therefore, to contribute much to the development and clarification of the theory of divestment legislation by Congress.<sup>89</sup> Whether Congress by divestment might submit a "legitimate" article of commerce to state control remained an unanswered question. The issue is not likely to arise in connection

<sup>86</sup> See the remarks of Senator Spooner, of Wisconsin, *ibid.*, p. 3513.

<sup>87</sup> In *State v. Bruce*, 55 W. Va. 384, 47 S. E. 146 (1904), a pink-coloring law which the state court had previously held operative against interstate shipments in *State v. Meyers*, 42 W. Va. 822, 26 S. E. 539 (1896), was held inoperative in such circumstance, on the authority of *Collins v. New Hampshire*, 171 U. S. 30 (1898). No reference was made to the second *Collins v. New Hampshire* ruling by the Supreme Court (see *supra*, p. 135, note 64) or to the divestment section of the Grout Act.

<sup>88</sup> *Grossman v. Lurman*, 192 U. S. 189 (1904); *Savage v. Jones*, 225 U. S. 501 (1912).

<sup>89</sup> An interesting issue was raised in the case of *United States v. Green*, 137 F. 179 (D. C., N. D. N. Y.) (1905). The defendant, who was charged with violating certain federal regulations governing the shipment of renovated butter, set up in defense that, the regulation of the sale of this commodity having been subjected to state authority, federal regulations on the same subject were inoperative. The contention was held to have no merit. This disposition of the question is in accord with pronouncements of the courts on the similar point raised in connection with the divestment provision of the Twenty-first Amendment. See *infra*, pp. 258-259.

with oleomargarine. The heavy federal tax on the manufacture of oleomargarine colored to resemble butter and upon adulterated butter<sup>90</sup> has proved to be of far greater consequence in achieving the objectives of the anti-oleomargarine interests than the divestment feature of the law. The states have also in recent years devised new means of discouraging the manufacture and sale of oleomargarine.<sup>91</sup> These new measures, while constituting indirect barriers to interstate trade, have successfully withstood attacks upon their validity in the federal courts.<sup>92</sup> The divestment section of the Grout Act may be classed with the similar section of the Lacey Act as merely a ratification of a judicial definition of the limits of state power in the prohibition of the traffic to which it applies.

<sup>90</sup> The tax features of the Grout Act were upheld by the Supreme Court in *McCray v. United States*, 195 U. S. 27 (1904), and *Cliff v. United States*, 195 U. S. 159 (1904). Enforcement difficulties in connection with the differential tax and shipping regulations led to the amendment of the 1902 law by later Congresses. See Act of Oct. 1, 1918, 40 Stat. 1008, Act of July 10, 1930, 46 Stat. 1022, Act of March 4, 1931, 46 Stat. 1549; Act of Feb. 24, 1933, 47 Stat. 902. Federal regulations governing the manufacture, shipping, and sale of oleomargarine and other butter substitutes are now found in 26 *United States Code* (1931), secs. 970-997.

<sup>91</sup> Increasing competition from oleomargarine manufacturers following the World War caused dairy interests to bring pressure to bear for further restrictive state and federal legislation. The additional federal legislation secured is cited above, note 90. State legislation resulting from this new drive took the form in most cases of (1) dealers' license taxes, (2) excise taxes on production, (3) prohibition of the use of dairy products in the manufacture of oleomargarine, and (4) prohibition of the use of oleomargarine in state institutions. On the general subject see Frederick E. Melder, *State and Local Barriers to Interstate Commerce in the United States*, University of Maine Studies, Second Series, No. 43 (1937), pp. 86-105, George R. Taylor, Edgar L. Burtis, and Frederick V. Waugh, *Barriers to Internal Trade in Farm Products* (Bureau of Agricultural Economics, 1939), pp. 17-30; Marketing Laws Survey, *Comparative Charts of State Statutes Illustrating Barriers to Trade between States* (1939), pp. 31-47.

<sup>92</sup> A Washington excise tax of fifteen cents a pound on local sales of oleomargarine was upheld in *Magnano Co. v. Hamilton*, 292 U. S. 40 (1931). The law was assailed on the grounds of interference with interstate commerce, denial of equal protection of the laws, and denial of due process of law. No reference to the divesting section of the 1902 act was made, since interstate sales were not directly affected under the terms of the state law involved. Idaho legislation requiring licenses of wholesale and retail dealers in oleomargarine was sustained in *Best Foods v. Welch*, 34 F. (2d) 682 (Idaho) (1929), against similar contentions. The fact that some of the licensees affected were engaged in handling out-of-state products was not regarded by the Court as controlling on the commerce-clause issue. A state law which, in effect, prohibited the manufacture of oleomargarine in Wisconsin by forbidding the use of dairy products in its manufacture was held void under the state constitution in *Jelke v. Emery*, 193 Wis. 311, 214 N. W. 369 (1927). Cf. also *Glen v. Field Packing Co.*, 290 U. S. 177 (1933).

## 3. MISBRANDED ARTICLES OF GOLD OR SILVER

THE Vreeland Act of 1906<sup>93</sup> offers an illustration of the use of the divestment formula of the Wilson Act to deny the implication that a positive regulation of a given subject by Congress should be deemed exclusive of state authority over the same subject. In order to prevent the perpetration of fraud Congress in 1905 enacted the "Hallmark" or "Jewelers' Liability" Act<sup>94</sup> forbidding the stamping of gold or silver articles so as to convey a false impression of a governmental guarantee of the fineness of the precious metals in them. Reputable manufacturers of such products, who thought that existing state and federal legislation on the general subject was inadequate, sought and secured the adoption of a supplementary measure. The new act was sponsored by Representative Vreeland, of New York. It provided that all articles of gold or silver or their alloys, transported in interstate or foreign commerce or through the mails, should, if branded at all, be marked in such a way as to indicate accurately the fineness of the precious metals contained.

The final section of the Vreeland Bill by employment of the Wilson Act divestment formula subjected to state control the articles of merchandise to which it applied.<sup>95</sup> The obvious purpose was to insure that the states should not be deemed to have been deprived of power to apply their laws to interstate shipments of such goods by reason of the federal regulation, and to invite them to enact supplementary laws of their own for the protection of the buying public. There was no thought expressed during the consideration of the bill in either the House or the Senate that the divestment section would enlarge state powers in dealing with the goods specified. Such opposition to the measure as was expressed was based rather upon the impropriety of the assumption of state police pow-

<sup>93</sup> 34 Stat. 262; 15 *United States Code* (1934), secs. 294-300.

<sup>94</sup> 33 Stat. 732; 15 *United States Code* (1934), secs. 291-293.

<sup>95</sup> Section 7 of the bill. The divesting provision, now found in 15 *United States Code* (1934), sec. 300, by its terms was applicable to "any article of merchandise manufactured after the date when this act takes effect, and made in whole or in part of gold or silver, or any alloy of either of said metals, and having stamped, branded, engraved, or printed thereon, or upon any tag, card, or label attached thereto, or upon any box, package, cover, or wrapper in which said article is encased or inclosed, any mark or word indicating or designed or intended to indicate that the gold or silver or alloy of either of said metals in such article is of greater degree of fineness than the actual fineness or quality of such gold, silver, or alloy, according to the standards and subject to the qualifications set forth in the following sections."

ers by the federal government proposed in other features of the bill.<sup>96</sup>

The divestment section of the Vreeland Act has not been judicially examined. The Supreme Court has repeatedly endorsed the principle that the commerce clause is not a barrier to the enforcement of state laws designed to protect the public against fraud.<sup>97</sup> From this it may be safely assumed that the divestment provision in this statute operates merely as a confirmation of powers already possessed by the states which Congress desired to leave unimpaired in the face of a positive federal enactment. Its significance in the development of the theory of legislation by divestment lies in the clear indication it gives of a Congressional view that an article of commerce may be subjected to the operation of state laws without thereby being placed outside the range of federal regulations.<sup>98</sup> The Supreme Court sustained the Wilson Act on the theory that Congress might define by legislation the point at which federal jurisdiction over an article moving in interstate commerce ceases and thus permit state regulations to operate upon it. Implicit in this theory was the presumption that an act of divestment completely eliminates all federal jurisdiction over an article beyond a given point in an interstate transaction. The Vreeland Act rests on the assumption that divestment merely terminates *exclusive* federal jurisdiction over a subject. Congress in this instance acted apparently on the assumption that, notwithstanding the enactment of a federal statute divesting a particular commodity of protection against state laws arising from its character as an article of commerce, federal laws may continue to apply to it in the fullest measure. Divestment of a subject matter by Congressional action places it within the range of a *concurrent* power to regulate.

#### 4. PLANT QUARANTINES

A USE of the divestment formula to authorize and invite coöperative state action in much the same fashion as in the Vreeland Act was made by Congress in a statute passed in 1926. By the Plant Quar-

<sup>96</sup> Cf. remarks of Representatives Sherley, of Kentucky, and Adamson, of Alabama, *Cong. Rec.*, 59th Cong., 1st Sess., p. 5349.

<sup>97</sup> *Plumley v. Massachusetts*, 155 U. S. 461 (1894); *Crossman v. Lurman*, 192 U. S. 189 (1904); *Savage v. Jones*, 225 U. S. 501 (1912).

<sup>98</sup> Cf. the case of *United States v. Green*, 137 F. 179 (D. C., N. D. N. Y.) (1905), *supra*, p. 144, note 89.

antine Act of 1912<sup>99</sup> as amended in 1917,<sup>100</sup> Congress vested broad authority in the Secretary of Agriculture to set up plant quarantines in interstate and foreign commerce. The Supreme Court ruled in 1926 that by reason of this federal legislation on the subject, the states were unable to establish plant quarantines operating in the interstate sphere.<sup>101</sup> The Court, while conceding that the states in the absence of superior federal enactments might set up quarantines against the movement of plants or animals in interstate commerce, insisted that this federal legislation in regard to plant quarantines was complete and exclusive. The nonexercise of power by a federal administrative officer to whom Congress had delegated responsibility for establishing interstate plant quarantines was deemed by the Court a denial of the need for one in the circumstances of the case.

Although the Court did not suggest directly that remedial legislative action might free the states from the restraining effect of the 1912 law, Congress immediately acted to achieve this objective. An amendatory measure proposed by Senator Jones, of Washington, was promptly passed.<sup>102</sup> It specifically recognized the authority of the states, in the absence of action by the Secretary of Agriculture, to establish plant quarantines.<sup>103</sup> An additional proviso employed the pattern of language of the Wilson Act to provide that any "nursery stock, plant, fruit, seed, or other product or article" upon which a federal quarantine was established under the 1912 law should be subject to the operation and effect of state laws as well.

The divestment provision was thus nothing more than an invitation to the states to coöperate in the establishment and enforcement of interstate quarantines upon plants. It is doubtful whether the Supreme Court would have construed the 1912 law so strictly as to forbid the states to apply quarantines to the same subjects

<sup>99</sup> Act of Aug. 20, 1912, 37 Stat. 315.

<sup>100</sup> Act of March 4, 1917, 39 Stat. 1165.

<sup>101</sup> *Oregon-Washington Railroad and Navigation Co. v. Washington*, 270 U. S. 87 (1926), reversing *State v. Oregon-Washington Railroad and Navigation Co.*, 128 Wash. 365, 223 Pac. 600 (1924). The quarantine involved was one set up by order of the Director of Agriculture of Washington in 1921. It applied to shipment of alfalfa into that state from certain specified districts in Idaho, Wyoming, Colorado, Oregon and Nevada.

<sup>102</sup> There was scarcely any opposition in Congress to the measure, which passed in each house without a recorded vote. See *Cong. Rec.*, 69th Cong., 1st Sess., pp. 6053, 6672-6673, 7004, 7054-7062, for its legislative history.

<sup>103</sup> Act of April 13, 1926, 44 Stat. 250. It has been incorporated in 7 *United States Code* (1934), sec. 161.

banned by a federal quarantine; but in any event the divesting clause provided a clear answer on the point. Neither the divesting clause nor the main provision of the amendatory act can be regarded as an authorization of the extension of state authority to a subject normally outside the range of state police power.<sup>104</sup> The 1926 statute was simply a clarification of the earlier Plant Quarantine Act in regard to the significance to be ascribed a failure of the Secretary of Agriculture to set up a quarantine or the establishment of one by him. The courts were instructed to permit concurrent state action in either event.<sup>105</sup>

The statutes surveyed in this chapter are illustrative of the use of the Wilson Act divestment formula to support the authority of the states to apply their prohibitive laws to subjects of commerce upon which federal regulatory acts were made operative. The objective of Congress in passing them was to prevent the placing of a conditionally-exclusive construction upon the national regulatory measures involved, rather than to extend state power over matters which the courts had held to be beyond state jurisdiction in the absence of Congressional action. Collectively, the divestment statutes relating to game, imitation dairy products, misbranded articles of gold or silver, and quarantined plants demonstrate one significant point regarding this regulative technique. Denial of the protective influence of the federal commerce power over a subject matter causes it to fall under a subordinate concurrent regulative authority of the state. It does not submit this subject matter to exclusive state control. Termination of the *protective influence* of the fact of federal jurisdiction and termination of *federal jurisdiction* are disjoined. Divestment by the Wilson Act formula achieves the former, but not the latter.

<sup>104</sup> The authority of states to establish animal quarantines applying to interstate commerce was recognized in *Rasmussen v. Idaho*, 181 U. S. 198 (1901); *Reid v. Colorado*, 187 U. S. 137 (1902); *Asbell v. Kansas*, 209 U. S. 251 (1908), and *Mintz v. Baldwin*, 289 U. S. 346 (1933). The power of states to set up plant quarantines in the absence of conflicting federal legislation was conceded in the *Washington Plant Quarantine Case*. See *supra*, p. 148.

<sup>105</sup> Notwithstanding the obvious purpose of the 1926 amendment, the Supreme Court of Oklahoma refused in 1928 to permit a state quarantine to be applied upon Texas sweet-potato plants, citing the *Washington Plant Quarantine Case* as authority. See *American Railway Express Co. v. Morris*, 129 Okla. 278, 264 Pac. 619 (1928). The 1926 statute was not advanced in argument and was not mentioned by the court.

## CHAPTER V

### EXTENSION OF STATE POWER UNDER THE WILSON ACT FORMULA

PROBABLY the most significant extension of state power over commerce under the Wilson Act formula was that which occurred with the passage of the Hawes-Cooper Act<sup>1</sup> in 1929, subjecting commerce in prison-made goods to state control. This act was noteworthy in a number of respects. The commerce affected by it not only was considerable in extent, but also involved the interests of states directly.<sup>2</sup> Indirectly this measure resulted in derangement of well-established systems of state penal institutional management and created a serious problem of readjustment of policy in those states which had theretofore relied upon production of goods for the open market to render their penal institutions at least partly self-supporting. The fact that it was passed only after a thirty-year period of agitation is indicative of the conflict of interests involved. Moreover, the extension of the divestment method of regulation to this form of commerce raised a very debatable constitutional issue in the light of prior judicial declarations on the commerce power. The eventual validation of the Hawes-Cooper Act has apparently opened the way for a much wider use of this method of regulation by Congress than had previously been assumed to be possible.

#### 1. COMMERCE IN PRISON-MADE GOODS

THE employment of prisoners in useful occupations, not only as a measure of public economy, but as incidental to the discipline, reformation, and rehabilitation of inmates of penal institutions, had

<sup>1</sup> Act of Jan. 19, 1929, 47 Stat. 1084.

<sup>2</sup> Statistics compiled in 1932 disclosed that in that year 65.7 per cent of the goods produced for the open market by state prison labor, to the value of \$18,375,375, were disposed of in interstate commerce. *Prison Labor in the United States—1932*, Bureau of Labor Statistics, Bulletin No. 595 (1933), p. 31. When the Hawes-Cooper Act became operative in 1934 the interstate market for these goods disappeared in large part.

become a general practice in American prison management by the middle of the nineteenth century.<sup>3</sup> By that time six distinct systems of prison employment had evolved. Under the *lease* system the prison management entered into a contract with an employer for the services of prisoners at a certain hourly or daily rate. It became the duty of the employer to guard, care for, and supervise the employment of the convict laborers whose services he had purchased. The *contract* system differed from the lease system in that, while the services of the convict laborer were contracted for by an outside employer, the prisoner remained in the custody of prison authorities while employed. The contractor supplied raw materials and supervised the work of prisoners, but was not responsible for their maintenance. The *piece-price* system was similar to the contract system except that the contractor paid for convict labor at a stipulated price per unit of finished product rather than on a per capita work-time basis. By the *state-account* system the prisoner was employed under the complete supervision of prison authorities, who undertook not only to manage production but also to market the goods thus produced. The *state-use* system of employment was similar to the state-account system, except that the products were disposed of to governmental units rather than through sale in the open market. Under the *public-works-and-ways* system of employment convicts were employed, not in manufacturing or farming, but, as the term indicates, in supplying unskilled and semiskilled labor on public construction projects, such as roads and buildings.

Owing to the low cost at which prison-made goods could be placed upon the market and the resulting low prices for these commodities, prison employment, particularly under the first four of the systems mentioned above, early aroused the opposition of free labor and manufacturers who felt in most direct fashion the force of such competition. Lowered wage scales and destructive price cutting were pointed out as the ultimate results of prison-labor employment in production for the open market.<sup>4</sup> Protests against the

<sup>3</sup> For extended discussion of the evolution of prison-labor policies and the problems involved see Henry C. Mohler, "Convict Labor Policies," 15 *Journal of Criminal Law and Criminology* 530 (Feb., 1925), Louis N. Robinson, *Should Prisoners Work?* (1931).

<sup>4</sup> An excellent account of the development of organized-labor opposition to prison-labor competition and of remedial state legislation may be found in E. T. Hiller, "Labor Unionism and Convict Labor," 5 *Journal of Criminal Law and Criminology* 851 (March, 1915).



inhumane methods of treatment of prisoners employed under the lease system were also voiced by the more enlightened penal authorities, as well as by civic reform organizations. These criticisms resulted in attempts by many of the states to bring about a modification of their prison-labor policies in order to eliminate or to reduce direct competition with the products of free labor and free enterprise on the open market, and to abolish some of the more brutal employment practices. The remedial legislation took the form of diversification of prison industries to prevent the burden of competition from falling heavily upon a few outside industries; restriction of the hours of employment for prisoners; restriction of the use of machinery in prisons, prohibition of the teaching of certain handicrafts and trades to prisoners; restriction and eventual abolition of the lease system of employment; and, so far as possible, substitution of the state-use and public-works-and-ways systems of employment for the other forms.

Measures such as these failed in one important respect to give the full degree of relief desired. A state which had restricted or abandoned the policy of employing its own prisoners in production of goods for the open market might very well find that it had merely made itself the dumping ground for prison-made products of other states which still relied heavily upon the lease, contract, piece-price, or state-account systems of employment. Accordingly, those states which had gone furthest in attempting to exclude prison-made goods from the open market considered it necessary to supplement their prison-labor statutes by laws regulating the sale of prison-made goods in their jurisdiction. Laws adopted for this purpose took the form of requirements that such goods be branded or tagged to show their origin and thus to enable prospective buyers to discriminate against prison-made goods in their purchases, the exaction of heavy license fees from dealers in such goods, and, in some instances, absolute prohibition of the sale of prison-made goods in the open market.

Coming at a time when the Supreme Court was just beginning to restrict state police powers in reference to interstate commercial transactions through application of the original-package doctrine,<sup>5</sup> these state statutes restricting open-market sales of prison-made

<sup>5</sup> *Bowman v. Chicago and Northwestern Ry. Co.*, 125 U. S. 465 (1888); *Leisy and Co. v. Hardin*, 135 U. S. 100 (1890).

goods fared badly when their constitutionality was tested before state tribunals. The first state law of this character to be judicially examined was a New York statute of 1894.<sup>6</sup> It required all convict-made goods manufactured outside the state and offered for sale in New York to be labeled to show their prison origin.<sup>7</sup> A state court declared the act void on the ground that it operated as a discrimination against interstate commerce.<sup>8</sup>

After this decision the New York law was amended to apply equally by its terms to all prison-made goods offered for sale on the open market in the state.<sup>9</sup> The defendant in the previous case was again arrested and charged with a violation of the new law by reason of having in his possession for purposes of sale unlabeled prison-made goods manufactured in an Ohio prison. The state statute was held void as imposing a direct burden upon interstate commerce. This ruling upon the question of constitutionality of the statute was sustained by the Appellate Division of the Supreme Court,<sup>10</sup> and subsequently by the Court of Appeals.<sup>11</sup>

State license tax laws applicable to dealers in prison-made goods of extrastate origin likewise proved to be unconstitutional when tested in state courts. In 1897 an Ohio statute of this character came before the Supreme Court of that state. The act applied in specific terms only to dealers in goods of extrastate origin. The state court upheld the contention of the defendant that the license tax imposed a burden upon interstate commerce and constituted an

<sup>6</sup> *New York Laws*, 1884, c. 698. The act was a revision of an earlier statute on the subject passed in 1887.

<sup>7</sup> By Article III, sec. 29, of the New York Constitution of 1894 the state had adopted the state-use system of employment for its own prisoners. Hence the state law made no reference to prison-made goods produced locally.

<sup>8</sup> *People v. Hawkins*, 32 N. Y. S. 524 (S. Ct.) (1895).

<sup>9</sup> *Laws*, 1896, c. 931.

<sup>10</sup> *People v. Hawkins*, 47 N. Y. S. 56 (1897).

<sup>11</sup> *People v. Hawkins*, 157 N. Y. 1, 51 N. E. 257 (1898). The defendant contended the state statute was invalid upon two separate grounds: (1) conflict with the guarantee of due process of law in the state constitution, and (2) invasion of the exclusive power of Congress over commerce. The Court was divided upon the issues presented by the case. Justice O'Brien, who delivered the opinion of the Court, held the act to be invalid upon both counts. Three other members concurred with him only in respect to the second ground. Bartlett, J., delivered a dissenting opinion, concurred in by Chief Justice Parker and Justice Haight, maintaining that the act was a valid police-power enactment, conflicting in no wise with either the state or the federal constitution. The commerce-power issue, upon which the Court was divided four to three, was thus the controlling one.

invasion of the exclusive power of Congress over the subject.<sup>12</sup> The court placed the invalidity of the act upon a conflict with the implied will of Congress as indicated by its silence, as had the United States Supreme Court in *Leisy v. Hardin*. The Ohio court followed that opinion of the Supreme Court further by indicating that, if Congress should see fit to remove the implication drawn from its silence and consent to state imposition of such a burden upon interstate commerce, the state act might be considered valid. It did not attempt to characterize such possible action by Congress as a release of the state's police power. In frank language it admitted that the giving of such consent would enable the state to regulate the "importation" of convict-made goods to the same extent that Congress might.<sup>13</sup>

Later a similar New York statute was held invalid by the courts of that state.<sup>14</sup> In this instance the ground for invalidation was conflict with the guarantees of due process of law in the state and federal constitutions, rather than with the commerce clause. Naturally, no mention was made of the possibility of Congressional consent to enable the state to levy a tax of this character. In view of these rulings by the New York and Ohio courts and those of the United States Supreme Court in the liquor cases the Supreme Court of Massachusetts, when requested to give an advisory opinion in 1912 on the constitutionality of a proposed prison-goods labeling bill, felt obliged to advise that the measure would be invalid as an invasion of the exclusive power of Congress over commerce.<sup>15</sup>

The states attempting to restrict open-market sale of prison-made

<sup>12</sup> *Arnold v. Yanders*, 56 Ohio St. 417, 47 N. E. 50 (1897).

<sup>13</sup> *Ibid*, pp. 421-422:

"The mere silence of congress is not sufficient to authorize a state legislature to legislate upon a subject vested by the constitution in congress, but such silence is to be regarded as evincing the intention of congress that the power shall remain where the constitution has placed it.

"To give a legislature power to legislate in such cases, requires an act of congress to that effect.

"The act in question is not a police regulation, but an attempt to prevent, or at least discourage, the importation of convict-made goods from other states and thereby protect our citizens, laborers, and markets against such goods. But if we are in a condition to require such protection, the appeal for relief must be made to congress, which body alone has the power to legally grant such relief."

<sup>14</sup> *People v. Raynes*, 120 N. Y. S. 1053 (S. Ct., App. Div.) (1910); affirmed without opinion, 198 N. Y. 539, 92 N. E. 1097 (Ct. of App.) (1910).

<sup>15</sup> *In re Opinion of the Justices to the Senate*, 211 Mass. 605, 98 N. E. 334 (1912).

goods were thus confronted with the same constitutional barrier which the prohibition states had encountered in 1890 in their attempts to control the liquor traffic. The method by which Congress had disposed of that problem offered a key to the solution of the new difficulty. In 1897 efforts were begun to secure the passage of a measure divesting prison-made goods of their immunity from state control. The movement ultimately succeeded with the adoption of the Hawes-Cooper Act in 1929.

#### A. THE HAWES-COOPER ACT

Before appeal was made to it for enactment of a divestment law applying to prison-made articles Congress had begun to show a response to the protests of organized labor against prison-labor competition. It recognized the convict-labor question to be one of national concern as early as 1886, when, in accordance with a Congressional resolution, a comprehensive inquiry into prison industries was undertaken by the Bureau of Labor. The resulting report,<sup>16</sup> an exhaustive study of over six hundred pages, embraced a compilation of prison industrial statistics, a compilation of state laws, and an analysis of state investigations on the subject, together with a carefully considered review and evaluation of the legislative remedies suggested for dealing with the problem.<sup>17</sup> The report noted that suggestions had been made by some state authorities that Congress should prohibit the importation of convict-made goods from abroad and should deny the use of interstate commercial facilities for the transportation of prison-made goods outside the state of origin. The report approved the first suggestion, but expressed doubt as to the expediency as well as the constitutionality of the second.<sup>18</sup> It also frowned upon the suggestion that labeling laws might afford relief.<sup>19</sup> The opinion was offered that the soundest remedy for the evils complained of, taking into

<sup>16</sup> *Convict Labor, Second Annual Report of the Commissioner of Labor* (1886); also printed as *House Executive Document No. 2470*, 49th Cong., 2d Sess.

<sup>17</sup> According to Howard B. Gill, in "The Prison Labor Problem," 157 *Annals of the American Academy of Political and Social Science* 83 (Sept., 1931), the 1886 report "covered every proposal or argument advanced to solve the prison labor problem up to 1886 and since." The report did not include a consideration of the divestment method of Congressional regulation, since that mode of treatment had not yet been evolved.

<sup>18</sup> *Convict Labor, Second Annual Report of the Commissioner of Labor*, p. 386.

<sup>19</sup> *Ibid.*, pp. 386-387.

consideration all aspects of the problem, was to be found in the diversification of prison industries and the extension of the state-use and public-works-and-ways systems of prison employment. These measures, if adopted, would eliminate the interstate traffic problem almost completely, and would reduce the depressive effect of prison employment upon wages and prices.

After the publication of this report action was taken by Congress to minimize in some degree the evils of prison-labor competition with free labor. In 1887 an act was passed prohibiting the hiring or the contracting out of the labor of United States prisoners in either federal or state penal institutions, a policy which has been continued to the present day.<sup>20</sup> In the Tariff Act of 1890 a section was incorporated forbidding the importation of convict-made goods from abroad,<sup>21</sup> a policy which was continued in later tariff acts.<sup>22</sup> Legislation in 1904 terminated the practice of contracting for the purchase of postoffice materials or supplies manufactured by convict labor;<sup>23</sup> and, beginning with legislation applicable to the Atlanta Penitentiary in 1901,<sup>24</sup> Congress inaugurated the state-use system of employment in federal prisons. This policy was eventually extended to all United States prisons and reformatories.<sup>25</sup>

Congress responded less readily to the demand that it use its

<sup>20</sup> Act of Feb. 23, 1887, c. 213, sec. 1, 24 *Stat.* 11, 18 *United States Code* (1934), sec. 708.

<sup>21</sup> Act of Oct. 1, 1890, sec. 51, 26 *Stat.* 624.

<sup>22</sup> Act of Aug. 27, 1894, sec. 24, 28 *Stat.* 552, Act of July 24, 1897, sec. 31, 30 *Stat.* 211; Act of Aug. 5, 1909, sec. 14, 36 *Stat.* 87, Act of Oct. 3, 1913 (I), 38 *Stat.* 195; Act of Sept. 21, 1922, sec. 307, 42 *Stat.* 937, Act of June 17, 1930, sec. 307, 46 *Stat.* 689; 19 *United States Code* (1934), sec. 1307.

In the Smoot-Hawley Tariff Act of 1930 the prohibition was broadened to include "goods, wares, articles and merchandise mined, produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanction." The term "forced labor" was defined to mean "all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily." The broadened provision was aimed primarily at Russian goods.

<sup>23</sup> Act of April 28, 1904, c. 1759, sec. 1, 33 *Stat.* 435; 5 *United States Code* (1934), sec. 367. This principle was given general application to other departments by Act of June 30, 1932, c. 314, sec. 602, 47 *Stat.* 418; 31 *United States Code* (1934), sec. 686b (b).

<sup>24</sup> Act of March 3, 1901, c. 853, sec. 1, 31 *Stat.* 1185, 18 *United States Code* (1934), sec. 793.

<sup>25</sup> Act of May 27, 1930, c. 340, 46 *Stat.* 391, 392; 18 *United States Code* (1934), secs. 744a-744n.

power over interstate commerce to assist or to coerce the states in the development of systems of prison industries less inimical to the interests of free labor and industry. This was not due, however, to absence of activity in Congress by advocates of federal regulation of interstate traffic in convict-made goods. In the thirty years preceding the adoption of the Hawes-Cooper Act hardly a session of Congress passed without one or more bills of this character being introduced. Favorable action by the House on divestment bills was obtained on no fewer than four different occasions prior to 1929.

Several factors were responsible for Congressional hesitation in the face of this long-continued drive for federal support in curbing interstate commerce in prison-made goods. Failure to act was attributable in some degree to honest doubt of the constitutionality of a regulation of interstate commerce in such goods by Congress, particularly after the Supreme Court invalidated the first Child Labor Act in 1918.<sup>26</sup> But the main obstacle to favorable action was the opposition of certain interested groups. Prison contractors and prospective purchasers of cheap prison-made products saw in the proposal to prohibit interstate traffic in such goods the destruction of their market. Prison administrators argued that a policy of restriction of such interstate traffic would ruin state-prison industries, increase the net cost of prison maintenance, and necessitate extensive readjustments in disciplinary and reformatory policies generally. The series of extensive investigations and reports made by various federal agencies during this period are an evidence not only of the realization of the complexities of the problem, but also of a continuing desire to find a solution acceptable to all interests involved.<sup>27</sup>

Congressional attention was first directed toward proposals to

<sup>26</sup> *Hammer v. Dagenhart*, 247 U. S. 251 (1918).

<sup>27</sup> After the first comprehensive study of the problem by the Bureau of Labor in 1886 studies were made periodically by it and the Department of Labor, by which it was succeeded, and by other agencies. See *Prison Labor*, *Tenth Annual Report of the Commissioner of Labor* (1895), *Prison Labor*, *Third Report of the United States Industrial Commission* (1898), *Convict Labor*, *Twentieth Annual Report of the Commissioner of Labor* (1906); *Federal and State Laws Relating to Convict Labor*, Department of Labor (1914), *Convict Labor in 1923*, Bureau of Labor Statistics, Bulletin No. 372 (1925); Advisory Committee on Prison Industries, *Prison Industries*, Domestic Commerce Series, No. 27, Department of Commerce (1929); *Prison Labor in the United States—1932*, Bureau of Labor Statistics, Bulletin No. 595 (1933).

prohibit interstate carriage of convict-made goods rather than toward divesting legislation. In the decade of the 1890's numerous bills designed to prohibit the interstate transportation of such goods, or to require branding to disclose their origin, were introduced in the House. In several instances favorable committee action was obtained, but only one measure of this character reached the discussion stage on the floor of the House.<sup>28</sup> In 1897 the first bill proposing to apply the divestment method of regulation to such commerce appeared.<sup>29</sup> No action was obtained upon it. Additional impetus to the movement for passage of this type of regulatory measure was given, however, when in 1898 the United States Industrial Commission suggested that, if Congress found it impossible or inexpedient to prohibit interstate commerce in prison-made goods altogether, it might well adopt a measure modeled upon the Wilson Act, subjecting this commerce to state control.<sup>30</sup>

In the first session of the Fifty-sixth Congress favorable action was secured in the House upon a divestment bill relating to prison-made goods. This resulted when the Committee on Labor reported a divestment proposal as a substitute for a bill introduced by Representative Cochrane, of New York.<sup>31</sup> The substitute measure was passed by the House on May 21, 1900, under suspension

<sup>28</sup> In the first session of the Fiftieth Congress in 1888 a bill to prohibit interstate shipment of prison-made goods, introduced by Representative O'Neill, of Missouri, was reported favorably by the House Committee on Interstate and Foreign Commerce. See *H. Rept.* 2022 on H. R. 8716, 50th Cong., 1st Sess. A sharp difference on the question of its constitutionality was evoked on the floor of the House, but the bill failed to reach a vote on final passage. *Cong. Rec.*, 50th Cong., 1st Sess., pp 4514 ff.

<sup>29</sup> The bill (H. R. 2780) was introduced by Representative Slayden, of Texas. He later stated that his immediate object in introducing it was to enable his state to prohibit the importation and sale of shoes manufactured in Missouri prisons. *Cong. Rec.*, 62d Cong., 2d Sess., p 2805.

<sup>30</sup> *Prison Labor, Third Report of the United States Industrial Commission* (1898), p. 15. It should be noted also that in 1897 the Ohio Supreme Court had indicated in its opinion in *Arnold v. Yanders* that Congressional action might enable states to regulate the importation of prison-made goods. See *supra*, p. 154, note 13.

<sup>31</sup> *H. Rept.* 1415 on H. R. 5450, 56th Cong., 1st Sess. The Cochrane Bill was a proposal to prohibit interstate commerce in prison-made goods. The committee report expressed the opinion that the Constitution deprived the states of power to prohibit interstate commerce in prison-made goods, but did not confer that power upon Congress. It suggested further that Congress might "remove the barrier to successful action by the states"—presumably by a divestment statute.

of the rules and without a record vote.<sup>32</sup> There was only a brief discussion of the bill, and its constitutionality was not questioned. Such discussion as there was turned chiefly around the suggestion made by Representative Bailey, of Texas, that the divesting formula might well be employed in dealing with "trust-made goods" likewise, a suggestion which was seconded by other Democratic members.<sup>33</sup> The bill died in committee in the Senate.

Divestment bills continued to be introduced in succeeding sessions of Congress. Six years later favorable action was again taken by the House on a proposal of this character. On December 7, 1906, a divestment bill<sup>34</sup> similar in terms to the one passed by the House in 1900 was given House approval. Again the discussion on the floor was short and perfunctory, with no question being raised on the point of constitutionality. Although the measure passed the House with only negligible opposition,<sup>35</sup> the Senate failed to act upon it.

Bills, and even constitutional amendments,<sup>36</sup> in great number and variety on the subject of interstate commerce in convict-made goods were introduced in Congress during the period from 1907 to 1912. In 1912 the House once more gave its approval to a divestment bill applying to prison-made goods.<sup>37</sup> Discussion of the bill resulted in a broadening of its terms to include goods "produced or mined" as well as those "manufactured" by convict labor. This

<sup>32</sup> *Cong Rec*, 56th Cong., 1st Sess., p. 5809.

<sup>33</sup> *Ibid.*, pp. 5805, 5807. In the first session of the next Congress a bill prohibiting interstate commerce in "trust-controlled" goods was introduced by Representative Bailey, but it was not reported out by the Judiciary Committee to which it was referred. *Cong Rec*, 57th Cong., 1st Sess., p. 184.

<sup>34</sup> H. R. 12318, introduced by Representative Hunt, of Missouri, 59th Cong., 1st Sess.

<sup>35</sup> The bill was passed without a roll-call vote, but a division on a test vote showed a favorable majority of 138 to 3. *Cong Rec.*, 59th Cong., 2d Sess., p. 177.

<sup>36</sup> On May 1, 1908, Senator Owen, of Oklahoma, introduced an amendment proposal which would have recognized the power of states to "regulate or prohibit the shipment into the state of any article of commerce injurious to public health or morals, or the product in whole or in part of convict labor." *Cong. Rec.*, 60th Cong., 1st Sess., p. 5514. The proposal (S. R. 80) was designed not only to meet the problem of traffic in prison-made goods, but also to clarify the situation in respect to state control of the liquor traffic, which, despite the enactment of the Wilson Act, was unsatisfactory to the prohibition states.

<sup>37</sup> *Cong. Rec.*, 62d Cong., 2d Sess., pp. 2785, 2805, 2807. The bill (H. R. 5601) was introduced by Representative Booher, of Missouri. See *H Rept.* 222, 62d Cong., 2d Sess.



alteration was designed to enable states to reach the products of prison-operated mines and farms as well as factories. Again the Senate failed to act.<sup>38</sup>

In the first session of the Sixty-third Congress a veritable avalanche of proposals to regulate commerce in convict-made goods descended upon Congress. Bills appeared in both the House and the Senate. Some proposed to tighten the existing law prohibiting the importation of foreign convict-made goods, which had proved ineffective;<sup>39</sup> others sought to prohibit interstate transportation of such goods or to require that they be labeled; some contemplated regulation by divestment. A divestment bill introduced by Representative Booher similar to that passed by the House in the preceding Congress was again taken up by the House. It was passed on March 4, 1914, by an overwhelming vote of 305 to 2.<sup>40</sup> The chief criticism of the measure was that of Representative Mann, of Illinois. Pointing to the experience with the Wilson Act, he charged that the proposed bill was "not worth the paper it was printed on."<sup>41</sup> Taking further account of experience gained in dealing with the liquor-traffic problem, he proposed as a substitute for the bill under consideration one which made illegal the transportation into any state of convict-made goods intended to be received, possessed, or sold in violation of the laws of the state. His substitute was modeled upon the Webb-Kenyon Act, which Congress had found necessary to pass the previous year to supplement the Wilson Act. The Mann substitute went one step beyond the Webb-Kenyon Act, however, in providing a federal penalty for violation of its terms. The substitute was rejected by a vote of 216 to 78.<sup>42</sup> It was significant in that it proposed the method of

<sup>38</sup> Hearings were held before a subcommittee of the Senate Judiciary Committee. The testimony given was largely that of lobbyists opposing the bill on grounds of lack of merit and unconstitutionality. For a report of the hearings see *S. Doc.* 446, 63d Cong., 2d Sess. (No. 6593).

<sup>39</sup> A bill (H. R. 14330) to make the prohibition of importations of foreign prison-made goods more effective passed the House and was favorably reported in the Senate, but failed of passage in the latter body. According to the committee reports on the bill, the policy of excluding foreign prison-made goods originally adopted in the Tariff Act of 1890 had never been made effective. There had been "no seizures, forfeitures or penalties imposed under its provisions." See *H. Rept.* 358, on H. R. 14330, 63d Cong., 2d Sess., p. 3, also *S. Rept.* 557, 63d Cong., 2d Sess., p. 2.

<sup>40</sup> *Cong. Rec.*, 63d Cong., 2d Sess., p. 4302.

<sup>41</sup> *Ibid.*, p. 4292.

<sup>42</sup> *Ibid.*, p. 4301.

regulation respecting convict-made goods later adopted in the Ashurst-Sumners Act of 1935.

The Booher Bill once more failed to be acted upon by the Senate, but that body at last exhibited signs of an awakening interest in the question of controlling interstate commerce in prison-made goods. The committee to which the Booher Bill was referred was discharged from considering it by motion of the Senate. The bill's progress stopped at that point.<sup>43</sup> A divestment bill introduced in the Senate by Senator Hughes, of New Jersey, was also reported favorably, but was not taken up.<sup>44</sup> The Senate went no further than to adopt a resolution directing administrative authorities to assemble more complete statistics and information on the problem.<sup>45</sup>

The entry of the United States into the World War caused for a time a slackening of effort to obtain regulative legislation by Congress on the subject of interstate commerce in prison-made goods. Wartime conditions demanded the fullest use of the labor resources of the nation, and a period of relative prosperity tended to minimize the effects of prison competition with free industry. Moreover, the language of the Supreme Court in the *First Child Labor Case*,<sup>46</sup> in 1918, had caused serious doubts to arise concerning the constitutional power of Congress to regulate commerce in goods of prison manufacture. Although divestment bills were introduced in considerable number during the period of the World War and immediately afterwards, none was taken up for consideration.<sup>47</sup>

On December 3, 1924, after complaints by certain manufacturers that prison competition was ruining their businesses and forcing down wage scales, Secretary of Commerce Hoover assembled a conference of manufacturers and prison administrators to consider measures to deal with the problem. As a result of the conference an Advisory Committee was set up by Secretary Hoover to make a

<sup>43</sup> *Ibid.*, p. 4721.

<sup>44</sup> *S. Rept.* 771, on S. 2321, 63d Cong., 2d Sess.

<sup>45</sup> The resulting study was published as *S. Doc.* 494, 63d Cong., 2d Sess. (No 6584).

<sup>46</sup> *Hammer v. Dagenhart*, 247 U. S. 251 (1918).

<sup>47</sup> Favorable committee action was given two House divestment bills and one Senate bill in this period. See *H. Rept.* 75, on H. R. 6871, 64th Cong., 1st Sess.; *S. Rept.* 385, on S. 4061, 64th Cong., 1st Sess.; *H. Rept.* 1041, on H. R. 8653, 69th Cong., 1st Sess.

study and to report on possible remedies. The resulting report,<sup>48</sup> concluding that the problem was one to be dealt with essentially by the states, suggested that the rôle of Congress should be that of "upholding" the states in the efforts which they might make toward its solution.<sup>49</sup> This somewhat vague endorsement of the divestment plan of regulation, together with a rising demand for action from labor and industry, at last induced Congress to act.

In the Seventieth Congress the movement crystallized in support of companion bills, introduced by Senator Hawes, of Missouri, and Representative Cooper, of Ohio, proposing to subject interstate commerce in prison-made goods to state control.<sup>50</sup> On May 15, 1928, the Cooper Bill was passed by the House by a one-sided vote.<sup>51</sup> A recommendation of the House Labor Committee that the effective date of operation of the proposed bill be postponed until the states should have time to adjust their prison industrial policies to the new system of control was received favorably by the House. The effective date of the measure was set forward three years from the date of enactment.<sup>52</sup> The House refused to adopt amendments which would have exempted from the force of the measure the products of prison farms or of federal penal institutions manufactured for the use of the United States Government.<sup>53</sup>

Prior to this action by the House on the Cooper Bill the Senate

<sup>48</sup> Advisory Committee on Prison Industries, *Prison Industries*, Domestic Commerce Series No. 27, Department of Commerce (1929).

<sup>49</sup> *Ibid.*, p. vii. Two of the twenty members on the Advisory Committee, Henry Pope, representing the prison contractors, and Sanford Bates, representing the prison administrators, were unable to agree with the majority in recommending measures leading toward curtailment of prison industries by eliminating interstate traffic in prison-made products. *Ibid.*, pp. viii-x.

<sup>50</sup> The first divestment bills introduced by Senator Hawes and Representative Cooper, S. 823 and H. R. 6044, respectively, were not taken up. The bills reported were S. 1910 and H. R. 7729, introduced by them in collaboration. The report in each instance was made after extensive hearings. See *S. Rept.* 344, 70th Cong., 1st Sess.; *H. Rept.* 887, 70th Cong., 1st Sess. A divestment bill (S. 1792) was also introduced by Senator Walsh, of Montana.

<sup>51</sup> *Cong. Rec.*, 70th Cong., 1st Sess., p. 8759. The vote on final passage was 303 to 39. The opposition votes were scattered among representatives from fourteen states, Virginia's delegation, with seven votes, and Alabama's and Connecticut's, with five each, leading the opposition.

<sup>52</sup> *Ibid.*, p. 8759. The committee had recommended a two-year period for adjustment of state policy.

<sup>53</sup> The first of these amendments was defeated 140 to 37; the latter, 82 to 75. *Ibid.*, pp. 8755, 8756. The second proposal was inserted by the Senate, and remained in the completed bill.

received a favorable report on the Hawes Bill. During its consideration by the Senate the Cooper Bill was passed by the House, and was substituted for the similar Senate bill.<sup>54</sup> Although a substantial majority of the members of the Senate were favorably disposed toward the measure, no vote was taken during the first session of the Seventieth Congress, owing to parliamentary maneuverings by its opponents.<sup>55</sup>

Soon after the beginning of the second session of the Seventieth Congress the Cooper Bill was taken up by the Senate, and after a short debate was passed on December 19, 1928.<sup>56</sup> Certain minor changes in the bill were approved by the Senate, the most important of which were the advancement of the date of effectiveness to five years after passage and the exemption of goods manufactured by the labor of probationers or parolees, as well as goods made in United States institutions for federal governmental use. As in the House, the proposal to exempt products of prison farms was defeated, but a proviso was adopted exempting farm products processed by prison labor for manufacturing purposes.<sup>57</sup> On the question of passage 65 votes were cast in favor of the bill, while only 11 senators opposed it.<sup>58</sup> A conference committee brought about House acceptance of all the Senate changes except the proviso respecting the processing of farm products, which was eliminated. The bill was signed by the President on January 19, 1929, and it became effective in extending state control over commerce in prison-made goods on January 19, 1934.<sup>59</sup> The text of this statute, the product of a thirty-year struggle in the halls of Congress, was as follows:

1. All goods, wares, and merchandise, manufactured, produced, or mined, wholly or in part, by convicts or prisoners, except convicts or

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<sup>54</sup> *Cong. Rec.*, 70th Cong., 1st Sess., p. 8968.

<sup>55</sup> Senator Stephens, of Mississippi, who insisted upon an amendment exempting the products of prison farms from the terms of the bill, was responsible for the failure to take a vote. Because of extended debate upon this point the time allotted for consideration of the bill by agreement was passed before a vote could be taken.

<sup>56</sup> *Cong. Rec.*, 70th Cong., 2d Sess., p. 876.

<sup>57</sup> *Ibid.*, pp. 874-875. The proviso was offered by Senator McNary, of Oregon, who explained that it was intended to cover the processing of flax and certain other western farm products which were processed in some states by prison labor to prepare them for sale to manufacturers.

<sup>58</sup> *Cong. Rec.*, 70th Cong., 2d Sess., p. 876.

<sup>59</sup> 45 Stat. 1084; 49 *United States Code* (1934), sec. 60.

prisoners on parole or probation, or in any penal and/or reformatory institutions, except commodities manufactured in Federal penal and correctional institutions for use by the Federal Government, transported into any State or Territory of the United States and remaining therein for use, consumption, sale or storage, shall upon arrival and delivery in such State or Territory be subject to the operation and effect of the laws of such State or Territory to the same extent and in the same manner as though such goods, wares, and merchandise had been manufactured, produced, or mined in such State or Territory, and shall not be exempt therefrom by reason of being introduced in the original package or otherwise

2. This act shall take effect five years after the date of its approval

#### B. THE CONSTITUTIONALITY OF THE HAWES-COOPER ACT

Debate upon the Hawes-Cooper Bill in Congress evoked the most extended discussion of the constitutional theory underlying this type of legislative measure since the passage of the Wilson Act. Opponents were in a position to criticize it on several grounds. They pointed out its probable dislocative effects upon prison-labor policies in those states which continued to follow the practice of employing prisoners in producing goods for the open market, and the practical difficulties of enforcement of state restrictive regulations. They were also able to formulate a very persuasive argument against it upon constitutional grounds. While it was evident that objections based upon constitutional grounds were secondary for the most part to objections arising from considerations of the merits of the policy involved, the attitude taken by some opponents of the measure was apparently governed mainly by the issue of constitutionality.

The argument against the bill upon constitutional grounds ran along the following line: The theory upon which the Supreme Court had sustained the Wilson Act was that Congress, since it had the power to regulate interstate commerce in intoxicating liquors to the full extent of prohibition of that commerce, might exercise the lesser power of removing from that commodity a part of the protection afforded by the commerce clause. By denying the implication derived from its silence Congress might "regulate" commerce in liquors by subjecting to state control the incidental right to dispose of such goods in the original package. But this divestment principle could not be applied to articles not inherently dangerous to public health, safety, or morals. It was conceded that the Court had sustained the power of Congress to prohibit commerce in certain commodities. This power, it was insisted, extended only

to articles which either were intrinsically dangerous or objectionable, as, for example, impure food and drugs, or were obtained or were intended to be used in violation of generally accepted standards of law and morality, as, for example, stolen automobiles.

Critics of the bill pointed out further that the Court had denied to Congress the power to regulate manufacturing under the guise of regulating interstate commerce. In the case most closely paralleling the one under consideration, when Congress had sought to exclude from commerce the products of child labor, the Supreme Court had denied to Congress the power in question.<sup>60</sup> In its opinion, moreover, the Court had seemingly closed the door to any form of federal regulation of commerce wherein the regulation was founded upon the labor conditions under which the articles of commerce concerned were produced.<sup>61</sup> After that decision had been made, it was generally believed that Congress could not prohibit interstate commerce in prison-made goods, and attempts to secure such legislation had been abandoned.<sup>62</sup>

<sup>60</sup> *Hammer v. Dagenhart*, 247 U. S. 251 (1918).

<sup>61</sup> *Ibid.*, p. 273, where Justice Day, speaking for the majority, declared

"There is no power vested in Congress to require the States to exercise their police power so as to prevent possible unfair competition. Many causes may cooperate to give one State, by reason of local laws or conditions, an economic advantage over others. The Commerce Clause was not intended to give to Congress a general authority to equalize such conditions. In some of the States laws have been passed fixing minimum wages for women, in others the local law regulates the hours of labor of women in various employments. Business done in such States may be at an economic disadvantage when compared with States which have no such regulations; surely, this fact does not give Congress the power to deny transportation in interstate commerce to those who carry on business where the hours of labor and the rate of compensation for women have not been fixed by a standard in use in other States and approved by Congress.

*"The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to control the States in their exercise of the police power over local trade and manufacture. To sustain this statute would . . . sanction an invasion by the federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the States."* (Italics mine.)

<sup>62</sup> Representative Cooper himself admitted in discussion of the bill that he was "aware of the fact that should Congress enact a law preventing the shipment of legitimate goods in interstate commerce, it would be unconstitutional." *Cong. Rec.*, 70th Cong., 1st Sess., p. 8648. The opinion was also expressed in House Reports on earlier divestment bills that Congress could not prohibit such commerce absolutely, a fact which was urged as justification for employment of the divestment method of regulation in support of the state police power. See *H. Rept.* 4782, 59th Cong., 1st Sess., and *H. Rept.* 1697, 61st Cong., 2d Sess.

The argument against the bill went further than to question the existence of a plenary power in Congress to prohibit interstate commerce in prison-made goods. Even if it were conceded that Congress had constitutional authority to prohibit interstate commerce in prison-made goods, there still remained a question concerning the validity of the use of the divestment method of regulation upon this subject. Prior statutes employing this method of regulation had applied it to goods which were by their nature subject to state police control. But traffic in goods of prison manufacture was presumably not amenable to regulation by states under their *police power*. This fact was tacitly recognized in the wording of the measure itself. Instead of submitting commerce in prison-made goods to the "operation and effect of the laws of the state enacted under its police power," as the Wilson Act had done, the Hawes-Cooper Bill submitted it to the "operation and effect of the laws of the state."<sup>63</sup> This, it was maintained, was evidence drawn from the proposed act itself that the purpose was to permit the states to *regulate interstate commerce* in prison-made goods, not merely to "release" a police power held in check by a superior federal authority over commerce in them.

On the point whether the states had power to control interstate sales of prison-made goods by virtue of their police power or their power to regulate commerce in respect to matters of local concern, decisions of state courts had been uniformly adverse.<sup>64</sup> The Supreme Court, it is true, had modified somewhat the views stated in *Leisy v. Hardin* on the question of state power to control interstate commerce in the original package;<sup>65</sup> but there was no substantial

<sup>63</sup> See *supra*, p. 164. This wording had appeared in the first divestment bill passed by the House in 1900, and was retained in subsequent drafts of the bill. It should be noted also that the Hawes-Cooper Act subjected prison-made goods to state control "upon arrival and delivery" within the state, whereas the comparable phrase of the Wilson Act employed the term "upon arrival." This change was made to cause the proposed legislation to conform to judicial interpretation of the Wilson Act.

<sup>64</sup> See *supra*, pp. 152-154.

<sup>65</sup> Two notable cases wherein the Supreme Court had relaxed the principle of exclusiveness of the federal commerce power in favor of state control over commerce in original packages, viz., *Plumley v. Massachusetts*, 155 U. S. 461 (1894), and *Silz v. Hesterberg*, 211 U. S. 31 (1908), have been discussed in the preceding chapter. See also *Cook v. County of Marshall*, 196 U. S. 261 (1905), *Austin v. Tennessee*, 179 U. S. 343 (1900), and *Price v. Illinois*, 238 U. S. 446 (1915), in all of which the Court placed a narrow construction upon the term "original package." Deliberate evasion of state restrictions by shipping goods

basis for assuming that it had modified its views to the point of holding that the states might prohibit or regulate the interstate sale of goods not intrinsically dangerous to public health, safety, and morals.

To state their position briefly, the critics of the bill, relying upon the opinion of the Supreme Court in the *First Child Labor Case*, questioned the power of Congress to regulate commerce in prison-made goods and, consequently, its power to divest such goods of the protection enjoyed under the commerce clause. Assuming that Congress possessed power of regulating such commerce, they questioned the bill further because its terms suggested an attempt to delegate to the states a power to regulate commerce, not an attempt to release a legitimate state police or revenue power.<sup>66</sup> In elaboration of their argument they placed much emphasis upon the potential danger to the freedom of commerce nationally in recognizing a power in Congress to permit states to regulate the sale of goods upon the basis of labor conditions attending their manufacture. The possibility of legislation in the future directed against the products of "open shops," of Negro labor, and of immigrant labor was noted. To some members of Congress this implication in the measure seemed to be decisive in determining their attitude toward it.<sup>67</sup>

In replying to these arguments the supporters of the Hawes-

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in interstate commerce in the small packages used in retail trade rather than in interstate shipment was condemned by the Court in these cases. In *Sonneborn Bros. v. Cuelton*, 262 U. S. 506 (1923), the Court sustained a state occupation tax on all wholesale dealers in oil, based upon a per cent of the gross amount of sales in the state and with no exemption of those sales which were interstate in character.

<sup>66</sup> The best exposition of the constitutional argument against the measure was that given by Senator Goff, of West Virginia, in which he reviewed carefully the Supreme Court decisions touching on the power of Congress to regulate and prohibit interstate commerce rendered in the period from 1890 to 1925. *Cong. Rec.*, 70th Cong., 2d Sess., pp. 853 ff. For other considered criticisms on constitutional grounds see the remarks of Senator Blease, of South Carolina, *Cong. Rec.*, 70th Cong., 1st Sess., pp. 8074 ff., and of Representative Henry St. George Tucker, of Virginia, *ibid.*, p. 8655.

<sup>67</sup> Senator Borah, of Idaho, was particularly alarmed at the implication of the proposal in respect to possible action by Congress enabling the states to bar "open-shop" goods and thus force the recognition of labor unions everywhere. *Cong. Rec.*, 70th Cong., 2d Sess., pp. 864, 867. See also the remarks of Senator Metcalf, of Rhode Island, *ibid.*, 1st Sess., p. 4305; Representative Merritt, of Connecticut, *ibid.*, p. 8658, and Representative Montague, of Virginia, *ibid.*, pp. 8662-8663.



Cooper Bill presented a triple defense. In the first place, they maintained that the decisions of the Supreme Court upholding the Wilson Act had conclusively settled the question of constitutionality. What Congress had done with a recognized article of commerce, such as intoxicating liquors, it might do also with convict-made goods. The proposed measure followed closely the language of the 1890 divesting act. If the one was not a delegation of power to the states to regulate commerce, then the other was not invalid on that ground.

In the second place, in answer to the contention that it was necessary to show that Congress possessed the power to regulate or prohibit commerce in prison-made goods in order to be able to subject it to state control, they pointed out that there had as yet been no ruling by the United States Supreme Court denying to Congress this power. Congress had forbidden the introduction of such goods from abroad without a question being raised concerning its authority to do so. Its power to regulate interstate commerce was necessarily coextensive with its power to regulate foreign commerce, except for the special provisions of the Constitution relating to the latter.

There had been decisions of the Supreme Court upholding the power of Congress to forbid the use of interstate commercial facilities in furtherance of objectives contrary to public interest and the general welfare, even though the articles or subjects of such commerce were innocent in themselves.<sup>68</sup> These decisions gave reason for assuming that Congress might be conceded power to prohibit or to restrict commerce in prison-made goods which had fallen under the ban of the law in a great number of the states. Advocates agreed further that even if the *Hammer v. Dagenhart* decision was regarded as controlling on the power of Congress to regulate commerce in prison-made goods, this ruling was made only by a

<sup>68</sup> The cases cited particularly in this connection were *Champion v. Ames*, 188 U. S. 321 (1903) (*The Lottery Ticket Case*); *Hoke v. United States*, 227 U. S. 308 (1915) (*The White Slave Act Case*); and *Brooks v. United States*, 267 U. S. 432 (1925) (*The Dyer Act Case*). Attention was also called to a ruling of the Federal Trade Commission, *In re Commonwealth Manufacturing Co.*, 11 F. T. C. 133 (1927). By this ruling a distributing firm was ordered to cease representing itself as the producer of goods which it handled and to cease branding such goods to convey the impression that they had been inspected or manufactured in accordance with United States Army specifications, when in fact they were prison-made.

five-to-four majority of the Court and many legal commentators believed the minority opinion stated the sounder view on the constitutional issue involved. Moreover, in view of the strong criticism of the reasoning of the Court in *Hammer v. Dagenhart*, it was questionable whether the principle enunciated in that case would be extended in future rulings.

Finally, supporters of the Hawes-Cooper Bill contended that, granting that Congress lacked the power to prohibit interstate commerce in prison-made goods upon the basis of the ruling in *Hammer v. Dagenhart*, such a view of the scope of the federal commerce power did not preclude judicial acceptance of legislation of the character proposed. The First Child Labor Act was overthrown by the Court because it was an attempt by Congress to invade the reserved powers of the states. By denying to them an interstate market for goods not produced in accordance with certain labor standards prescribed in the federal act Congress had attempted to coerce the producing states into acceptance of a federal labor standard. The proposed bill was not open to that objection. It contemplated a cooperative plan of action between Congress and the states which were the prospective receivers of prison-made goods. The prohibition or regulation which it authorized was one conditioned upon state initiation and enforcement of the regulations or prohibitions to be made. Hence there could be no valid objection to the measure as an invasion of the reserved powers of the states, as there was in reference to the Child Labor Act. In any event, the only way to ascertain the constitutionality of the proposed bill would be to pass it and allow the Court to settle the question. If it should be upheld, the good sense of Congress could be trusted to prevent an undue and ill-advised extension of the principle of regulation by divestment to goods produced under particular labor conditions. If it should be held unconstitutional, then Congress might consider what further steps should be taken.<sup>69</sup>

It would appear upon comparison of these two points of view on the question of constitutionality that, considering solely the

<sup>69</sup> One of the ablest presentations of the arguments in favor of the constitutionality of the bill while it was under consideration by Congress was that contained in a brief submitted by Donald R. Richberg to the Senate Committee on Interstate Commerce during the hearings on the Hawes Bill. It is printed in *Cong. Rec.*, 70th Cong., 2d Sess., pp. 665-667. See also the remarks of Representative Kopp, of Iowa, *ibid.*, 1st Sess., pp. 8651 ff.

principles upon which the Court had sustained the Wilson Act in the *Rahrer* case and had invalidated the First Child Labor Law in *Hammer v. Dagenhart*, the position of the critics of the bill was the stronger. If the power to divest is incidental to the power to regulate, then the existence of a power in Congress to regulate to the point of prohibition must be the controlling issue. If the power does not exist in Congress to prohibit interstate commerce in goods produced by one form of substandard labor, it does not exist to prohibit commerce in goods produced by another. *Hammer v. Dagenhart* denied to Congress the power to regulate commerce so as "to control the States in the exercise of the police power over local trade and manufacture."<sup>70</sup> The regulation of commerce in prison-made goods would seem to fall under this ban, whether attempted in direct fashion or indirectly by divestment. If a Congressional prohibition of interstate commerce in certain goods upon the basis of conditions attending manufacture is an unconstitutional interference with the internal affairs of the states, it is no less an interference with their internal affairs for Congress to regulate commerce in such a way as to allow other states to do the same thing. It is as much an interference with the regulation of manufacturing in Alabama prisons for Congress to allow Ohio to prohibit the sale of Alabama prison-made goods in Ohio as for Congress to do so itself. The lesser power to *allow* prohibition of interstate commerce in prison-made goods between certain states implies the existence of the greater power to *prohibit* all interstate commerce in such goods. If the one is denied to Congress, then the other must be also.

The supporters of the bill were quick to recognize the logical weakness in this view of the commerce power. If the states lacked power to control the interstate transportation and sale of prison-made goods, as had been uniformly held by state courts following the principle of *Leisy v. Hardin*, and if Congress likewise lacked the power to do so, upon the basis of the principle of *Hammer v. Dagenhart*, then a no man's land in commercial regulation would be established, wherein neither the states nor the federal government could operate. The states could not regulate because of the existence of the federal power over commerce and the "silence of Congress"; Congress could not regulate because of the reserved

<sup>70</sup> 247 U. S. 251, 273 (1918).

powers of the states. Pressing their opponents for an explanation of this anomaly, the defenders of the bill were able to force them into an admission that the decisions of the Court, carried out to their logical conclusion, implied that somehow in the process of the delegation of the commerce power to Congress through the adoption of the Constitution a part of the power to regulate commerce formerly belonging to the states had "evaporated."<sup>71</sup> The power no longer existed in the states, nor did it belong wholly to Congress. When finally pinned down upon this point, Senator Borah, an opponent of the measure, at last frankly admitted that he saw no reason to deny the existence of such a no man's land of regulation. He observed that it was reasonable to assume that under the federal system "power to control some kinds of commerce may not exist anywhere."<sup>72</sup> In his opinion this lost power to regulate commerce could be revived, for either the states or Congress, only by a constitutional amendment.

On the other hand, the defenders of the bill were also forced into a difficult position. In the *Rahrer* opinion the Court had sustained the divestment mode of regulation in reference to intoxicating liquors on the theory that Congress is vested with plenary power to regulate commerce in that subject. Unless they denied that the rule of the *First Child Labor Case* was governing on the point of Congressional power to regulate commerce in prison-made goods, they were placed in the position of defending the proposition that there existed under the Constitution a species of regulatory power over commerce which was neither strictly state nor national, a power which could be exercised only by the states and Congress working together. To admit this was to deny the fundamental theory underlying the division of power between the national government and the states under the Constitution. The exercise of Congressional power in a certain sphere would be made dependent upon state approval and action. It is true that the Constitution recognizes a field of regulation which the states may not invade

<sup>71</sup> This point was stressed particularly by Senators Fess, of Ohio, and Walsh, of Montana, in criticizing the theory upon which the opponents of the measure attempted to establish its unconstitutionality. *Cong. Rec.*, 70th Cong., 2d Sess., pp. 864-866.

<sup>72</sup> *Ibid.*, p. 867 "A power is not a disembodied spirit. We can extinguish it if we want to." Cf. the argument against the constitutionality of the act by Charles H. Davis, "The Hawes-Cooper Act Unconstitutional," 23 *Lawyer and Banker* 296 (Nov.-Dec., 1930).

without Congressional consent, but it does not recognize a field of power in which Congress can act only with the consent of the states.<sup>73</sup>

Some of the supporters of the bill recognized this point of vulnerability in their argument. They eliminated it by frankly declaring that the minority opinion in *Hammer v. Dagenhart* gave the proper answer on the question of Congressional power over commerce.<sup>74</sup> The broad definition of the scope of the federal power over commerce given by Justice Holmes afforded ample basis for sustaining the proposed legislation divesting prison-made goods of protection against state regulation. It seems significant that no one attempted to defend the bill's constitutionality by questioning the soundness of judicial pronouncements on the limitations on state police power to control sales of goods in the original package, as had been done during consideration of the Wilson Bill.

Judicial pronouncements made in cases since the passage of the Hawes-Cooper Act have partly clarified these issues. The states were quick to take advantage of the new power conferred upon them by the act. By January 19, 1934, when it became effective, over half of them had enacted laws restricting or prohibiting the sale of prison-made goods on the open market, applicable to goods introduced in interstate commerce.<sup>75</sup> Because of the anticipated

<sup>73</sup> Cf. *United States v. Hill*, 248 U. S. 420, 425 (1919): "The control of Congress over interstate commerce is not to be limited by state laws."

<sup>74</sup> See the remarks of Senator Walsh, of Montana, *Cong. Rec.*, 70th Cong., 2d Sess., p. 865, and Senator Shortridge, of California, *ibid.*, p. 871. Mr. Richberg, in concluding his brief in support of the constitutionality of the bill, stated his belief that the minority opinion in *Hammer v. Dagenhart* was the "better law" and would provide a "much sounder basis" for the proposed legislation than the majority opinion in that case. *Ibid.*, p. 667. In defending the constitutionality of the bill Representative Kopp, of Iowa, found it more effective to quote from the minority opinion of Justice Holmes on the "plenary power" of Congress to prohibit any commerce it deemed improper than to rely upon the statements in the majority opinion. *Ibid.*, 1st Sess., p. 8654.

<sup>75</sup> For a summary of new state laws enacted to take advantage of the wider powers permitted by the Hawes-Cooper Act see *Laws Relating to Prison Labor in the United States as of July 1, 1933*, Bureau of Labor Statistics, Bulletin No. 596 (1933), pp. 135-146; "Laws Relating to Prison Labor in the United States Enacted in 1933 and 1934," 39 *Monthly Labor Rev.* 1122-1131 (Nov., 1934); "State Laws Regulating Sale of Prison-made Goods," 45 *Monthly Labor Rev.* 1424 (Dec., 1937), which is a digest of the bulletin issued by the Prison Industries Reorganization Administration, *Chart and Comment on Laws Affecting the Labor of Prisoners and the Sale and Distribution of Prison-made Products in the United States*, Bulletin No. 1 (1938).

The last source given shows that in 1937 thirty-three states had restrictive laws affecting sale of prison-made goods produced in other states.

effects of these state laws about to become operative an attempt was made by the state of Alabama in 1933 to overthrow the Hawes-Cooper Act. Leave to file a bill for an injunction to prevent the enforcement of restrictive laws of nineteen states was sought by Alabama before the Supreme Court. The application was later narrowed to include as respondents only Arizona, Idaho, Montana, New York, and Pennsylvania. Each of these states had enacted statutes forbidding after January 19, 1934, open-market sale of prison-made goods. The Alabama complaint averred that 1,050 of its prison population of approximately 5,500 were employed on prison farms where cotton was a leading product, and that 1,250 were occupied in making shirts. Owing to the threatened closing of the market for prison-made cotton goods in the states named, employers of Alabama prison labor were unable to enter into profitable and "firm" contracts with distributors for the disposition of their products. It was further averred that Alabama faced an even greater potential loss, estimated at \$1,000,000, because of the necessity of reorganizing its prison industries.

In a brief opinion the Supreme Court unanimously refused to grant permission to file the bill.<sup>76</sup> Justice Butler, speaking for the Court, held the complaint to be multifarious and wanting in equity. No direct issue between Alabama and the states named in the application was established; it was not shown that the statutes in question might not be immediately tested by a prison contractor, who would have a direct interest, when they should be enforced against him; and the complaint had not shown that no other adequate market was available for Alabama prison-made goods outside the states named.

This ruling of the Court postponed an examination of the validity of state laws under the Hawes-Cooper Act until there had been actual attempts to apply them after the date of effectiveness of the national law. Opportunity was presented for judicial examination of the legal issues involved when cases arose subsequently in Ohio and Wisconsin. In the Wisconsin case the defendant, Whitfield, was indicted for violation of a Wisconsin statute,<sup>77</sup> enacted after the passage of the Hawes-Cooper Act, requiring the labeling of all prison-made goods produced outside the state and offered for sale on the open market in Wisconsin. The defense

<sup>76</sup> *Alabama v. Arizona, et al.*, 291 U S 286 (1934).

<sup>77</sup> *Wisconsin Statutes* (1933), secs. 343.652 and 132.13

set up was the alleged unconstitutionality of the state statute as an unauthorized interference with interstate commerce, since the goods involved were produced in Alabama and were offered for sale on the Wisconsin market in the original package.

The defendant was found guilty by the trial court and fined one hundred dollars, but the Wisconsin Supreme Court reversed the ruling.<sup>78</sup> Although admitting that Congress, under the principle set forth in *Hammer v. Dagenhart*, was without power to prohibit interstate commerce in prison-made goods directly,<sup>79</sup> the Wisconsin Supreme Court did not find the Hawes-Cooper Act objectionable on that ground. It was not a prohibitory act, but, like the Wilson Act, merely divested goods of their interstate character. The federal law thus allowed a prohibition or restriction to arise from the operation of state law. For reasons set forth in the *Rahrer* opinion there was no unconstitutional delegation of the commerce power. This disposed of the contention that the state act was void as resting upon an invalid federal act.

The court found, however, that the state labeling act was void. It applied in specific terms only to goods brought into the state from without and thus set up an unreasonable classification for purposes of regulation and discriminated unduly against interstate commerce. In attempting to meet this objection counsel for the state had shown that there was no discrimination in fact, because the policy of the state's prison authorities was to mark and label products produced in Wisconsin prisons, if offered for sale on the open market. The court declared it could not take official cognizance of this administrative action.<sup>80</sup> It indicated that the law would be valid if amended to apply equally to both local and out-of-state products. Hence the blow to state control of the distribution of prison-made goods by this ruling was not serious, since legislative action could remedy the fault which the court found to exist in the state statute as it stood.<sup>81</sup>

<sup>78</sup> *State v. Whitfield*, 216 Wis. 577, 257 N. W. 601 (1934).

<sup>79</sup> *Ibid.*, 216 Wis. 577, 580.

<sup>80</sup> *Ibid.*, p. 584. The failure of the Court to take cognizance of the administrative action which eliminated any discrimination in fact might well be questioned. See the note, "Validity of the Hawes-Cooper Act," 10 *Wisconsin Law Rev.* 398, 400 (April, 1935).

<sup>81</sup> The state law was subsequently amended to apply generally to all prison-made goods offered for sale in the state. *Wisconsin Laws*, 1935, c. 178.

The Wisconsin Supreme Court thus chose the course of harmonizing the Hawes-Cooper Act with *Hammer v. Dagenhart* by recognizing that Congress might regulate by divestment where it could not regulate by direct prohibition. The Ohio courts adopted a different position on the question. In the Ohio case the same defendant, Whitfield, was charged with a violation of an Ohio statute enacted on March 23, 1933,<sup>82</sup> prohibiting the sale of prison-made goods in that state on the open market. The Ohio law applied to local and out-of-state goods alike. The defendant was indicted upon two counts: (1) an open-market original-package sale in Ohio of men's work shirts manufactured in an Alabama prison; and (2) the sale on order of a consignment of goods of the same description for future delivery in Ohio. The trial court found the defendant guilty on both counts and assessed a fine of twenty-five dollars and costs. The decision was upheld by the state Court of Appeals<sup>83</sup> and by the Ohio Supreme Court.<sup>84</sup> The Court of Appeals, in a short opinion, based its ruling upon the point that, since Congress had broken its silence in regard to state control of commerce in such goods by the passage of the Hawes-Cooper Act, the state law was applicable<sup>85</sup>. Without referring to the decision of the Supreme Court in the *Dagenhart* case the court expressed the opinion that, since Congress possessed the power to prohibit interstate commerce absolutely in such goods,<sup>86</sup> it might choose the less drastic method of regulation by divestment. The Hawes-Cooper Act did not constitute a delegation of the commerce power to the state for the reasons set forth in the *Rahrer* case. The Ohio Supreme Court did not elaborate upon the opinion of the lower appellate court. Where the Wisconsin Supreme Court had attempted to reconcile the Hawes-Cooper Act with the principle of *Hammer v. Dagenhart*, the Ohio courts thus took the course of blandly ignoring that ruling. This action provided a more substantial foundation for the state act so far as its validity rested upon the federal law; it failed, however, to give any satisfactory explana-

<sup>82</sup> *Page's Ohio General Code, Anno.* (1937), secs. 2228-1, 2228-2

<sup>83</sup> *Whitfield v. State*, 197 N. E. 605 (1935).

<sup>84</sup> *Whitfield v. Ohio*, 129 Ohio St. 543, 196 N. E. 164 (1935).

<sup>85</sup> Cf. *Arnold v. Yanders*, 56 Ohio St. 417, 47 N. E. 50 (1897), *supra*, p. 154.

<sup>86</sup> *Whitfield v. State*, 197 N. E. 605, 608 (1935): "It is... well settled that Congress may carry its regulation of interstate commerce to the point of prohibition of such acts as may spread evil or harm to the people of states other than the state of origin."



tion of why the federal commerce power could reach commerce in prison-made goods, but not in child-made goods.

The Ohio case was brought before the United States Supreme Court for review. Since other states were interested in the outcome of the litigation, attorneys representing the states of New York and Minnesota were allowed to file briefs as *amici curiae* in support of the Ohio statute. Three contentions were brought forward by counsel for the plaintiff in error in urging the invalidity of the state statute: (1) that it violated the privileges and immunities of state and federal citizenship guaranteed by the Fourth Article and Fourteenth Amendment of the Constitution; (2) that it was an unconstitutional regulation of interstate commerce by the state; and (3) that the Hawes-Cooper Act upon which it was grounded was an unconstitutional delegation of the commerce power to the states by Congress.

None of these contentions was held by the Supreme Court to have merit.<sup>87</sup> One important aspect of the case was eliminated by passing over without examination the second count upon which the indictment was framed, viz., a sale of goods for future delivery wherein the transaction had not been completed so as to bring the goods involved into the jurisdiction of Ohio.<sup>88</sup> The Court declared that conviction upon the first count, if sustainable, would be sufficient to justify the sentence imposed.

The Court followed rather closely the pattern of reasoning set forth by the Ohio courts in reaching its conclusion that the ruling of the trial court should be upheld. Justice Sutherland declared that the state act must be upheld upon the basis of rulings sustaining the exercise of a similar authority in the state to prohibit original-package sales of intoxicating liquors under the Wilson Act. The Congressional act simply "relieved" imported goods from the operation of any rule which protected a right of sale in the original package, "a right the exercise of which has never been regarded as a fundamental part of the interstate transaction, but only as an incident resulting therefrom."<sup>89</sup> This was, of course,

<sup>87</sup> *Whitfield v. Ohio*, 297 U. S. 431 (1935).

<sup>88</sup> *Ibid.*, p. 438. Cf. the cases discussed in connection with the Wilson Act, *supra*, pp. 106-110. In the light of the principles which the Court had set up in cases under that act it is doubtful whether it would have sustained a conviction based on the second count.

<sup>89</sup> *Ibid.*, p. 440.

the accepted view of the effect of divestment legislation in giving a wider range of operation to state laws regulating the sale of goods in the original package.

The Court failed to go very far into the question of the basis of the power of Congress to "relieve" prison-made goods of this protection. It did not indicate clearly whether the power thus freed was the state's police power or some other power. There was no elucidation on the point whether the character of the goods dealt with might have any significance in limiting the authority of Congress or of the state. There was no mention of *Hammer v. Dagenhart* in the opinion. It was noted that there had been enacted numerous state acts, as well as certain federal acts, restricting the sale of prison-made goods, and that these acts proceeded "upon the view that free labor, properly compensated, cannot compete successfully with the enforced and unpaid or underpaid convict labor of the prison."<sup>90</sup> This would indicate that the economic objective sought was, in the eyes of the Court, a legitimate one. But the Court carefully refrained from stating in direct language that the power of Congress to "divest" such goods of the protection afforded by the commerce clause arose from its authority to regulate commerce in them, independently of state action. No attempt was made to define the power that a state employed in preventing sales, in the original package or otherwise, beyond referring to it as a "regulative" power.<sup>91</sup>

Evidence that the Court was not wholly satisfied with this explanation of the basis upon which the exercise of state power was rested is given in a passage near the close of the opinion. There is a vague suggestion of a retreat from the doctrine of *Leisy v. Hardin* in the intimation that the state might be held to possess the authority to prevent original-package sales of such goods in its own right, without reliance upon the federal act.<sup>92</sup> Caught be-

<sup>90</sup> *Ibid.*, p. 439.

<sup>91</sup> *Ibid.*, p. 438. It should be observed that the state law involved here was passed in 1933 before the Hawes-Cooper Act became effective in removing the commerce-clause impediment to state authority. A question similar to that of *In re Rahrer* was thus presented, that is, whether a state law passed *prior* to the removal of the barrier regarding control of original-package sales could have the effect of reaching them without reenactment after the divestment became effective. The point was not raised in the argument of the case and was not considered by the Court.

<sup>92</sup> *Ibid.*, p. 440, where Justice Sutherland declared: "Even without such action by Congress the unbroken-package doctrine, as applied to interstate com-

tween the opposing principles of *Leisy v. Hardin* and *In re Rahrer* on the one hand and *Hammer v. Dagenhart* on the other, the Court was forced to choose between weakening the one or the other if it was to sustain the state act in question. It followed the line of reasoning laid down in the liquor cases, but it failed to indicate to what extent the validation of the Hawes-Cooper Act involved a modification of the principles set forth in *Hammer v. Dagenhart*. To cover its indecision the suggestion was dropped that the original-package doctrine might eventually be modified so as to give to states wider authority in regulating the sale of original-package goods, without the sanction of Congress. If it should come to a downright choice whether the principle of *Leisy v. Hardin* or that of *Hammer v. Dagenhart* should be scrapped or radically altered, the intimation seemed to be that the latter was in less danger of overthrow. To the judicial mind there was evidently less to be feared in state regulation of interstate commerce through a weakening of the original-package doctrine as a limitation on state power than in the specter of a Congress using its power over commerce to control labor conditions under which manufacturing for the interstate market might be carried on.

Since this has to date been the only opinion of the Court interpreting the Hawes-Cooper Act, it remains to be seen what steps will be taken by the Court to reconcile its views on the constitutionality of this act with the *Dagenhart* ruling. At least three different views are possible regarding the bearing of the *Whitfield* decision on *Hammer v. Dagenhart*. The Court may take the position that a concession of power in Congress to divest prison-made goods of the protection of the commerce clause in this manner necessarily involves a concession of power in Congress to prohibit interstate commerce in them, but that this does not necessitate a concession of power in Congress to deal with child-made goods

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merce, has come to be regarded generally at least, as more artificial than sound. Indeed, in its relation to that commerce, it was definitely rejected in *Sonneborn Bros. v. Cureton*, 262 U. S. 506, 508-509, as affording no immunity from state taxation . . . . Whether that view of the doctrine as applied to state taxation should now be given more general application, the Hawes-Cooper Act, being determinative of the case now under review, makes it unnecessary for us to decide."

It should be noted that, while the decision in this case was made by a unanimous Court, Van Devanter, McReynolds, and Stone, JJ., concurred in the result only, without offering a separate opinion.

in a similar fashion. Again, it may hold that the concession of a Congressional power to divest prison-made goods does not involve a concession of power to prohibit interstate commerce in them; hence there is no incompatibility between this decision and that of *Hammer v. Dagenhart*. Such a position may or may not involve a concession of Congressional authority to regulate child-made goods by divestment. Finally, the Court may hold that the power of Congress to divest prison-made goods necessarily involves a concession of power to prohibit interstate commerce in them; and this concession necessarily involves a repudiation of the doctrine of *Hammer v. Dagenhart*.

On the basis of decisions of the Court upholding the authority of Congress to submit interstate commerce in intoxicating liquors to state control it seems more logical to assume that the Court will adopt the first or the third position rather than the second. It is difficult to see how the Court could sustain a Congressional act sanctioning a denial of access to an interstate market to states of production by the action of the states of destination, without conceding a Congressional authority to deny access to an interstate market for the same goods by direct regulation. Both forms of regulation involve action by Congress under the commerce power; both result in a coercion of the sending states; both have as their objective the raising of labor standards. If one is a valid exercise of the commerce power, the other is also. The Court may conceivably find grounds for making a distinction between the power of Congress to regulate commerce in prison-made goods and its power to regulate commerce in child-made goods; for in the latter there are social objectives in such legislation as well as economic, while in the case of prison-made-goods regulation the objective is wholly the elimination of an economic evil. But if a power to regulate by divestment exists in either case, it presumes a power to regulate by prohibition.<sup>93</sup>

If the second position is adopted, it must be conceded that an implied limitation upon the exercise of Congressional power over

<sup>93</sup> See the note, "Validity of Federally-enabled State Regulation of Convict-made Goods," 35 *Columbia Law Rev* 778 (May, 1935), on *State v. Whitfield*, 216 Wis. 577, 257 N. W. 601 (1934). See also on this point the note in 49 *Harvard Law Rev* 466 (Jan., 1936), "Constitutionality of Congressional Regulation of Interstate Transportation of Convict-made Goods," where it is suggested that the Court may find grounds for distinguishing *Hammer v. Dagenhart* although permitting Congressional regulation by divestment.

commerce exists in the relevancy of its action to policies of states of reception. There may be situations in which it is expedient for Congress to pursue a policy of regulating commerce by giving a wider operation to the laws of the states of reception only, rather than by closing the channels of commerce completely to a given class of goods. Such a method of regulation affords opportunity for taking into account sectional differences in regulatory standards. But this does not require acceptance of the principle that in dealing with these subjects Congress may use its regulatory power *only* in this manner. The principle that Congress may regulate interstate commerce in some matters *only* in cooperation with the states does not find support in any of the basic doctrine respecting the commerce power which has been developed to date.

The implications of the *Whitfield* decision relative to the power of Congress to prohibit directly interstate commerce in convict-made goods and goods made by child labor seem certain to be cleared up by the Court in the near future. The Fair Labor Standards Act of 1938 contains provisions prohibiting interstate movement of goods produced by exploited labor.<sup>94</sup> It thus constitutes an outright challenge to the Court to overrule *Hammer v. Dagenhart*. In 1940 Congress adopted legislation directly prohibiting the shipment of prison-made goods in interstate commerce, acting on the assumption that the Court's rulings sustaining the constitutionality of the Ashurst-Sumners Act and of the Hawes-Cooper Act necessarily implied the existence of the power to prohibit such commerce without reference to state regulations.<sup>95</sup> The child-labor provisions of the Fair Labor Standards Act and the 1940 statute prohibiting commerce in prison-made goods will in all likelihood stand or fall together; and for reasons stated here and later in this discussion the outcome will probably be a repudiation of the principle of *Hammer v. Dagenhart* and an affirmation of the power of Congress to regulate interstate commerce in these subject matters by direct prohibition.<sup>96</sup>

<sup>94</sup> See c. 676, sec. 12, 52 Stat. 1067; 29 U. S. C. A. (1940 Supp.), sec. 212. The origin of this statute is discussed *infra*, pp. 336-339.

<sup>95</sup> Public, No. 851, 76th Cong., 3d Sess. See *infra*, pp. 303-304.

<sup>96</sup> The ruling of the Supreme Court in the case of *United States v. Darby Lumber Co.*, 312 U. S. 100 (1941), sustaining the constitutionality of the Fair Labor Standards Act and expressly overruling *Hammer v. Dagenhart* was announced just as this manuscript was sent to the press. Circumstances make it impossible to include here an analysis of the Court's opinion.

It remains to be seen how far the Court will apply to the Hawes-Cooper Act the limitations ascribed to the similarly worded Wilson Act. The *Whitfield* opinion indicated that state legislation enacted under the Hawes-Cooper Act must not be discriminatory.<sup>97</sup> It is doubtful whether all the state laws now in effect could successfully withstand a court test on this point.<sup>98</sup> The enactment of further legislation by Congress restricting commerce in prison-made goods has, however, practically precluded the development of the situation which rendered the Wilson Act largely ineffective. Needless to state, the passage of the Hawes-Cooper Act and other restrictive federal legislation has had marked effect in bringing about a readjustment of state prison-employment policies in the direction of abandonment of production for the open market.<sup>99</sup> To the extent that the states adopt the state-use and public-works-and-ways systems of prison employment the likelihood of extensive litigation under the Hawes-Cooper Act will become more remote.

## 2. PRIZE-FIGHT FILMS

THE divestment technique of regulating commerce was most recently employed by Congress in 1940, in an act relating to prize-fight films. In 1912, after a Negro pugilist had won the world's heavyweight boxing championship, Congress deemed it advisable to enact a statute closing the mails and the channels of interstate and foreign commerce to shipments of motion-picture films depicting prize fights.<sup>100</sup> The law was subsequently sustained by the Supreme Court as a proper exercise of the power of Congress in regulating commerce.<sup>101</sup> Eventually, with the development of a changed public attitude toward professional boxing exhibitions, enforcement of the statute lagged, and the "bootlegging" of fight films across state lines became a common practice. Since no states prohibited the exhibition of such films,<sup>102</sup> it became difficult to

<sup>97</sup> *Whitfield v. Ohio*, 297 U. S. 431, 439 (1936).

<sup>98</sup> See the discussion of state laws on this point in connection with the Ashurst-Sumners Act, *infra*, pp. 300-301.

<sup>99</sup> See *infra*, p. 302.

<sup>100</sup> Act of July 31, 1912, 37 Stat. 240; 18 United States Code (1934), secs. 405-407.

<sup>101</sup> *Weber v. Freed*, 239 U. S. 325 (1915).

<sup>102</sup> *S. Rept.* 530, on S. 2047, 76th Cong., 1st Sess. The federal act was held not to prohibit the exhibition of prize-fight films in *Consolidated Amusements, Inc. v. Gobei*, 22 F. (2d) 296 (S. D. Fla.) (1927); *Rose v. St. Clair*, 28 F. (2d) 189 (W. D. Va.) (1928); *Noall v. Dickinson*, 49 Idaho 706, 292 Pac. 219 (1930).

justify the retention of the 1912 law to supplement state regulations in the interest of public safety and public morals. A movement for its repeal was therefore inaugurated.

In 1935 bills were introduced in Congress proposing to repeal the 1912 act and to substitute for it a divestment measure.<sup>103</sup> No action was taken by Congress at that time, but in 1940 a bill of this nature sponsored by Senator Barbour, of New Jersey, was enacted into law.<sup>104</sup> There was no opposition expressed against it in either house during passage,<sup>105</sup> or in the committee hearings conducted upon it in the Senate.<sup>106</sup>

It is unlikely that the Barbour Act will have much significance as an extension of state power. The states have shown no disposition to attempt to prevent the introduction of prize-fight films. Their power to do so in the absence of permissive federal legislation is a debatable question; but in any event there is no question of their authority to prevent the exhibition of such films, which is the desired objective. The constitutionality of a federal divestment act applying to this subject matter can hardly be questioned in the light of the Supreme Court ruling sustaining the 1912 law and the decisions in other divestment-law cases.<sup>107</sup> If Congress can prohibit interstate and foreign commerce in such goods it certainly enjoys the lesser power to subject them to state control while still within the federal jurisdiction as articles of commerce.

The phraseology employed in the Barbour Act deserves special mention. The act applies to "every film or other pictorial presentation of any prize fight or encounter of pugilists." Any such article, the law states, shall, when transported into any state for use, sale, storage, exhibition, or other disposition therein, be "divested of its character as a subject of interstate or foreign commerce to

<sup>103</sup> S. 2285 and H. R. 143, 74th Cong., 1st Sess. The bills were introduced by Senator Barbour, of New Jersey, and Representative Celler, of New York, respectively.

<sup>104</sup> Act of June 29, 1940, *Public*, No. 673; 76th Cong., 3d Sess.

<sup>105</sup> *Cong. Rec.*, 76th Cong., 1st Sess., p. 7084; *ibid.*, 3d Sess., p. 8897.

<sup>106</sup> See *Hearings on S. 2047*, 76th Cong., 1st Sess., by a subcommittee of the Committee on Interstate Commerce, May 25 and 26, 1939.

<sup>107</sup> In *H. Rept. 2348*, 76th Cong., 3d Sess., on H. R. 6401, a companion measure to the Barbour Bill introduced by Representative Osmer, of New Jersey, a letter from Attorney General Murphy was included in which it was stated that the validity of the divestment provision must be regarded as established by reason of the rulings which had been made in the *Rahrer* case and *Whitfield v. Ohio*.

the extent that it shall upon crossing the boundary of such State" be subject to the operation of its laws, enacted under the police power. This departure from the phraseology of the Wilson Act is noteworthy in several respects. For the first time the word "divest" appears in the body of a divestment statute. Furthermore, the language of the act is so chosen as not to convey the impression of a *termination of federal jurisdiction* over its subject matter. The goods in question are divested of character as subjects of interstate and foreign commerce to the extent that they become amenable to state regulation while still within the range of federal power. In other words, divestment is recognized for what it actually is—a sanctioning of the operation of state laws upon a specified subject matter of commerce without implication of a denial of federal jurisdiction over it. Finally, the act specifically declares that state laws shall have operative effect on the articles enumerated "upon crossing the boundary" of the state. Experience with judicial interpretation of the Wilson Act is reflected in this phrase. No opportunity is presented for judicial emasculation of the statute by application of the principles evolved in interpreting the phrase "upon arrival in such State" found in the Wilson Act. The authority of the state over the specified articles is extended to its borders, as contemplated in bills proposing to amend the Wilson Act after the ruling in *Rhodes v. Iowa*.<sup>108</sup>

Taken in its entirety the Barbour Act constitutes a modernized version of the divestment formula, designed to carry out effectively the intent of Congress to permit state laws to operate upon the articles specified, despite their being subjects of interstate and foreign commerce. If the divestment device is to be employed further, this act should be a more satisfactory model to follow than the statute which was its forerunner.

### 3. PROPOSALS TO EXTEND STATE POWER OVER INTERSTATE COMMERCE BY DIVESTMENT

THERE have been numerous suggestions, some of them accompanied by the introduction of bills in Congress, to apply the divestment method of regulation to commodities other than those already mentioned. A denial or a threat of denial of state authority to regulate a particular kind of commercial activity under the commerce clause

<sup>108</sup> See *infra*, pp 202 ff



has often been met by a proposal that legislation be enacted by Congress granting consent to state control. Indeed, attempts have been made to apply the divestment formula to all goods moving in interstate commerce, thus freeing state authority once and for all so far as the commerce clause and the original-package doctrine operate as a restriction.

Attention has already been directed to the fact that on the occasion of the passage of the Wilson Act the House passed the bill in a form making it applicable to "any article of commerce"; and that the House agreed somewhat reluctantly to a limitation of its terms to intoxicating liquors.<sup>109</sup> Later, when the Grout Oleomargarine Bill was under consideration in the House, Representative Tucker, of Virginia, tried without success to secure the adoption of an amendment to that bill to make it applicable to "all articles of commerce."<sup>110</sup> Proposals have also been made to apply the Wilson Act formula to cigarettes<sup>111</sup> and to "trust-made" goods.<sup>112</sup> It has been suggested that this method of regulation might prove feasible in regard to milk<sup>113</sup> and to electric power conveyed across state

<sup>109</sup> See *supra*, pp. 93-96. It should also be noted that Senator Vest, of Missouri, attempted to secure adoption of an amendment to the Wilson Bill to include meats and meat products within its scope. See *supra*, p. 89, note 110.

<sup>110</sup> See *supra*, p. 143, note 83. The position of Representative Tucker was that it was improper for Congress to legislate in order to enable state laws to operate upon goods moving in interstate or foreign commerce. He maintained that the states possessed this power in their own right under a proper construction of the commerce clause and the Tenth Amendment. His amendment was designed to prevent judicial restriction of state police power beyond its proper bounds and to put an end to the continual efforts of pressure groups in Congress to "subject" particular commodities to the authority of the states.

<sup>111</sup> H. R. 93, 56th Cong., 1st Sess., introduced by Representative Terry, of Arkansas. In 1895 a federal circuit court had invalidated a West Virginia license tax upon the sale of cigarettes in respect to a vendor offering them for sale in the original package. *In re Minor*, 69 F. 233 (Cir. Ct., W. Va.) (1895). This ruling may have been instrumental in causing the introduction of the bill, since the court in its opinion followed the example of the Supreme Court in *Leisy v. Hardin* by suggesting that Congress might act to relieve the state of its disability. Cf. *Austin v. Tennessee*, 179 U. S. 343 (1900), and *Cook v. County of Marshall*, 196 U. S. 261 (1905).

<sup>112</sup> See *supra*, p. 159.

<sup>113</sup> Forrest R. Black, "The Significance of the 'Divestment Theory' in the Regulation of Milk," 23 *Kentucky Law Jl.* 589 (May, 1935). The suggestion was made that the divestment principle might be employed to overcome the effect of the Supreme Court decision in *Baldwin v. Seelig*, 294 U. S. 511 (1935), by which a New York statute regulating the price of milk was invalidated in reference to milk produced outside the state.

lines.<sup>114</sup> In recent years divestment proposals of the greatest potential significance have been those directed toward enlarging state authority in dealing with commerce in goods produced under substandard labor conditions and in taxing interstate sales and capital employed in interstate commerce.

Proposals to apply the divestment method of regulation to goods produced under substandard labor conditions, especially those produced by child labor, were offered in considerable number in Congress after the Supreme Court's favorable holdings on the validity of the Hawes-Cooper and Ashurst-Sumners laws.<sup>115</sup> In 1937 a bill applying the Wilson Act divestment formula to child-made goods passed the Senate, but the House failed to act upon it.<sup>116</sup> On the basis of the holding of the Court in *Whitfield v. Ohio* there would seem to be little doubt concerning the validity of this form of regulation as applied to child-made goods. The feasibility of such a divestment act is much more questionable. The adoption of a direct prohibition on interstate shipment of goods of this character in the Fair Labor Standards Act of 1938, however, makes it unlikely that the divestment mode of regulation will be employed in relation to them.<sup>117</sup> If the child-labor provisions of the present federal

<sup>114</sup> William C. Scott, "State and Federal Control of Power Transmission as Affected by the Interstate Commerce Clause," 14 *Proceedings of the American Academy of Political and Social Science* 135 (April, 1930). Cf. *Public Utility Commission v. Attleboro Steam and Electric Co.*, 273 U. S. 83 (1927).

<sup>115</sup> The first bill proposing to apply the divestment method of regulation to child-made goods was that of Senator Schwellenbach, of Washington. His bill (S. 4736) was introduced on June 2, 1936, in the second session of the Seventy-fourth Congress. It was not reported out of committee. In the Seventy-fifth Congress over a dozen divestment bills applying to goods produced under substandard labor conditions were introduced.

<sup>116</sup> This divestment proposal was coupled with a plan to prohibit introduction of child-made goods into a state in violation of its laws, following the mode of treatment applied to convict-made goods in the Ashurst-Sumners Act. For this reason a fuller account of it is deferred until consideration has been given to the method of regulation embodied in that statute. See *infra*, p. 337.

<sup>117</sup> There is, of course, a possibility that the divestment method of regulation might be extended to goods produced under substandard labor conditions even if the prohibitory features of the Fair Labor Standards Act are upheld by the courts. Several bills proposing to extend the divestment formula to child-made goods and to goods produced under hour and wage standards lower than those of the destination state were introduced in Congress after the passage of the Fair Labor Standards Act in 1938. Cf. S. 53 and S. 54, introduced by Senator Clark, of Missouri, and H. R. 217, introduced by Representative Celler, of New York, 76th Cong., 1st Sess.

law should be overthrown, an experiment with divestment legislation in this subject might be tried.

Bills proposing to give Congressional consent to the levying of state taxes upon interstate sales and upon capital employed in interstate commerce have been strongly pressed in Congress since 1932. Although these bills have not followed closely the formula of divestment laid down in the Wilson Act, they have been supported in large part by arguments derived from the theory upon which that law was sustained. The argument, stated in simple terms, is that, if Congress can break its silence to permit the states to impose direct burdens upon interstate commerce under their police power, it may likewise permit them to impose direct burdens upon interstate commerce for revenue purposes.

In recent years the states have been compelled to seek new revenue sources in order to meet expanding budget needs. Their problem has been accentuated by depression conditions existing since 1930. In their search for new revenues the states have turned generally to retail-sales taxation and to other forms of business taxation. Although the courts have gone far toward modifying earlier principles evolved in determining the limits of state taxing power in relation to interstate commerce, the states have found themselves impeded and embarrassed in their new taxation policies by the commerce clause.<sup>118</sup> Efforts have therefore been directed toward securing Congressional legislation which will enable the states to

<sup>118</sup> It is impossible, owing to lack of space, to make a comprehensive survey of the principles developed and applied by the Supreme Court in limiting the taxing authority of the states under the commerce clause. In general, it may be said that the Court has consistently refused to permit state taxation of interstate sales or the gross receipts from such sales when at the time of sale the purchaser and the goods sold are in different states and consummation requires a transportation and delivery of goods to the purchaser. It has also refused to permit state taxation of the privilege of engaging in interstate business. On this aspect of the state's taxing power see R. J. Traynor, "State Taxation and the Commerce Clause in the Supreme Court, 1938 Term," 28 *California Law Rev.* 168 (Jan., 1940); William B. Lockhart, "State Tax Barriers to Interstate Trade," 53 *Harvard Law Rev.* 1253 (June, 1940); Lawrence M. Jones, "Some Constitutional Limitations on State Sales Taxes," 20 *Minnesota Law Rev.* 461 (April, 1936); Thomas C. Lavery and Thomas W. Maxson, "State Sales Taxation and the Commerce Clause," 10 *University of Cincinnati Law Rev.* 351 (Nov., 1936); George M. Johnson, "State Sales Taxes and the Commerce Clause," 24 *California Law Rev.* 155 (Jan., 1936); J. L. Gushman, "The Sales Tax and Interstate Commerce," 2 *Ohio State Law J.* 260 (May, 1936). Charles L. B. Lowndes, "State Taxation of Interstate Sales," 7 *Mississippi Law J.* 223 (Jan., 1935).

proceed more freely in applying their revenue measures to interstate business and interstate sales.

None of the earlier tax-consent bills introduced in Congress was acted upon.<sup>119</sup> In 1934 the Senate took favorable action upon a bill of this character introduced by Senator Harrison, of Mississippi.<sup>120</sup> The Harrison Bill, using language following in a general way that of the Wilson Act, made state sales taxes operative upon interstate transactions<sup>121</sup> Provisos were included to the effect that no state should be authorized to discriminate against the sale of products of any other state; that no sales tax should be levied upon goods introduced for the purpose of resale (since they would be subject to the state retail-sales tax upon completion of sale by the introducer); and that no political subdivision of the state should impose a tax upon interstate sales. Negotiation of a sale by solicitation

<sup>119</sup> The first tax-consent bills were introduced in 1932, by members of the delegation in Congress from Oklahoma. They had as their main objective the elimination of administrative difficulties in the allocation of taxes upon firms for business done and capital employed in interstate commerce. See S. 3071, H. R. 9692, and H. R. 11950, 72d Cong., 1st Sess., and S. 3215, H. R. 6161, and H. R. 8913, 73d Cong., 2d Sess. S. 3074, which was introduced by Senator Thomas, of Oklahoma, provided that "each of the several states may levy and collect license, franchise, gross revenue, registration or other forms of taxes upon, or measured by, any property employed, or business done, within such state, in interstate commerce, in the same manner and to the same extent as such taxes may be imposed under the constitution and laws of such state upon like property employed, and business done, in commerce wholly within the state . . ." Provisos were included to the effect that interstate business and capital should not be taxed in a discriminatory manner, and that the same property or business should not be taxed by more than one state. For a discussion of this bill and a defense of its constitutionality see C. W. King, "Taxation of Capital Employed in Interstate Commerce," 11 *Tax Magazine* 56 (Feb., 1933). In defending its constitutionality Mr. King, a former Oklahoma tax official, relied heavily upon a dictum of Justice Brewer in *Brennan v. City of Titusville*, 153 U. S. 289, 302 (1894). In that case the Court, in holding invalid an ordinance requiring a license for soliciting, indicated that the invalidity arose from a conflict with a rule prescribed by Congressional silence, and that this silence might be broken to permit the laying of a state tax burden upon interstate commerce.

<sup>120</sup> *Cong. Rec.*, 73d Cong., 2d Sess., p. 4598.

<sup>121</sup> Its principal provision, found in the first section, was as follows: "All taxes or excises levied by any State upon sales of tangible personal property, may be levied upon, or measured by, sales of like property in interstate commerce, by the State into which the property is moved for use or consumption therein, in the same manner, and to the same extent, that said taxes or excises are levied upon or measured by sales of like property not in interstate commerce, and no such property shall be exempt from such taxation by reason of being introduced into any State or Territory in original packages, or containers, or otherwise . . ."

was declared to constitute a sale within the meaning of the measure. A second section made all receivers, liquidators, referees, and other officers of any court of the United States liable upon the same basis as local enterprisers for all taxes and licenses levied by a state or its subdivisions.<sup>122</sup>

Despite the importance of the measure and the controversial constitutional issue involved the Harrison Bill was passed by the Senate without an objection being raised and without a record vote.<sup>123</sup> Although hearings were conducted by a subcommittee of the House Interstate and Foreign Commerce Committee on a similar bill,<sup>124</sup> introduced by Representative Sadowski, of Michigan, no favorable action was taken in that body. Later, Representative Colmer, of Mississippi, revived the issue in the House by the introduction of a measure similar to the Harrison Bill. In the Seventy-fifth Congress in 1937 and 1938 hearings were held on the Colmer Bill,<sup>125</sup> but no report was made. It was evident from these hearings that doubts were entertained concerning the constitutionality of the proposed legislation as well as the wisdom of the policy involved.

In the meantime a ruling by the Supreme Court sustaining the

<sup>122</sup> This provision was included at the suggestion of Senator Long, of Louisiana, in order to overcome the effect of a ruling by a district court in *Howe v. Atlantic, Pacific and Gulf Oil Co.*, 4 F. Supp. 162 (W. D. Mo.) (1933), setting up a limitation upon state power in this regard. This ruling was reversed in *Kansas City v. Johnson*, 70 F. (2d) 360 (C. C. A., Eighth) (1934).

<sup>123</sup> The report accompanying the Harrison Bill (S. Rept. 440, 73d Cong., 2d Sess.) did not attempt to discuss the constitutionality issue. Reference was made to briefs prepared by the National Association of State Tax Administrators at the hearings in support of the bill, and also to an article by E. M. Perkins, "The Sales Tax and Transactions in Interstate Commerce," which appeared in 12 *North Carolina Law Rev.* 99 (Feb., 1934), in support of the constitutionality of a measure of the character proposed. This article and the briefs mentioned may be found in *Hearings on S. 2663 and 2897*, before a subcommittee of the Senate Interstate Commerce Committee, 73d Cong., 2d Sess., pp. 15-39. The report on the Harrison Bill described it as a proposal "authorizing such [interstate sales] taxation by a grant from Congress of the power to tax such goods."

<sup>124</sup> *Hearings on H. R. 8303*, before a subcommittee of the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., Feb. 28, March 28, and April 11, 1934.

<sup>125</sup> *Hearings on H. R. 4214 and H. R. 4722*, before a subcommittee of the House Committee on Interstate and Foreign Commerce, 75th Cong., 2d and 3d Sess., Nov. 30, Dec. 1-3, 1937, and Jan. 4-6, 1938. H. R. 4214 was the Colmer Bill; H. R. 4722 was a bill introduced by Representative Patman, of Texas, proposing to tighten the antitrust laws by preventing large concerns from taking advantage of interstate sales immunities and engaging in other competitive practices injurious to local independent retailers.

authority of a state to levy a compensatory use tax upon commodities brought into a state upon which no sales tax had been collected elsewhere<sup>126</sup> opened up a way by which the states might attempt to equalize the tax burden upon local and interstate sales of goods. A later ruling sanctioning the application of a local sales tax upon goods introduced from another state under terms of a contract made in the taxing jurisdiction by the agent of an out-of-state seller<sup>127</sup> gave still wider scope for the operation of state and local sales taxes. These developments have apparently stalled the movement for federal legislation subjecting interstate sales to tax measures of the states. It remains to be seen how successful the states will be in making interstate commerce "pay its way" under their broadened powers. If the administrative difficulties involved in enforcing sales and use taxes prove insurmountable it is likely that a new drive will be made for enabling legislation by Congress.<sup>128</sup>

The constitutionality of a measure following the lines of the Harrison Bill can only be conjectured. On the whole, it would seem that the courts would not find it difficult to develop a theory upon which an act submitting interstate business to nondiscriminatory state tax laws could be sustained.<sup>129</sup> Arguments against such

<sup>126</sup> *Henneford v. Silas Mason Co.*, 300 U. S. 577 (1937). Cf. William C. Warren and Milton R. Schlesinger, "Sales and Use Taxes. Interstate Commerce Pays Its Way," 38 *Columbia Law Rev.* 49 (Jan., 1938).

<sup>127</sup> *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940).

<sup>128</sup> The Colmer Bill was reintroduced in Congress in 1939, but was not reported out of committee. See H. R. 1818, 76th Cong., 1st Sess. Two bills (H. R. 8796 and H. R. 9045) which would give Congressional consent to state taxation and regulation of itinerant vendors, transient merchants, and mail-order merchants were also introduced in the third session of the same Congress. No committee action was taken on them.

<sup>129</sup> There was a sharp difference of legal opinion on the question of the constitutionality of the Harrison Bill. The question formed the basis of a discussion at the meeting of the National Tax Association in 1934. At that time Professor Lowndes, of Duke University, advanced the opinion that the commerce clause would prove to be no obstacle to such an act, but that the guarantees of the Fourteenth Amendment might limit the extent of Congressional authority in this regard. *Proceedings of the National Tax Association* (1934), pp. 139-148. Professor Powell, of Harvard University, was in substantial agreement with this view. *Ibid.*, pp. 156-157. On the other hand, Professor Rottschaefer, of the University of Minnesota, took the position that the barrier to state taxation of interstate sales is a constitutional one and cannot be removed by positive action of Congress. *Ibid.*, pp. 149-155. For other expressions of views favorable to the constitutionality of such a measure see Perkins, *op. cit.*, and 12 *Tax Magazine* 311 (June, 1934). Briefs defending and attacking the constitutionality of bills of this general nature were presented at the Senate hearings on the Harrison Bill

an act on the ground that it would constitute a delegation of the commerce power to the states and would sanction a nonuniform regulation of commerce could be met by the same line of reasoning upon which the Wilson Act and other divestment legislation was sustained. It should be noted that several of the cases arising under the Wilson Act in which state power was upheld were cases involving the use of the taxing power. The authorization contained in the federal statute was deemed sufficient to remove any limitation found in the commerce clause.<sup>120</sup> A "constitutional" barrier to the exercise of state power was held to be one existing only by implications drawn from Congressional silence. If denial by Congress of the implication of its silence could permit state taxation of the solicitation of liquor sales and the business of selling such goods in the original package, it would appear that a similar denial concerning commerce in general would also permit nondiscriminatory state taxation.<sup>121</sup>

On the other hand, the Court has stated that it was the "exceptional character" of the goods dealt with which justified a Congressional act of divestment in relation to liquors.<sup>122</sup> This language appears to imply that the divestment authority of Congress can be used only in relation to goods which by their peculiar characteristics are proper subjects of state police-power regulation. Subsequent validation of the Hawes-Cooper Act by the Supreme Court discredited the proposition that goods must be *mala per se* to warrant their subjection to state control when moving in interstate commerce. The *Whitfield* decision demonstrated that state power to legislate for economic objectives can be released by a divestment act. This ruling goes far toward justifying an assumption that

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in the Seventy-third Congress; at the House hearings on the Sadowski Bill in the same Congress; and at the House hearings on the Colmer Bill in the Seventy-fifth Congress. See *supra*, p. 188, notes 123, 124, and 125

<sup>120</sup> See the discussion of *Pabst Brewing Co. v. Crenshaw*, 198 U. S. 17 (1905), and subsequent cases involving the state's taxing power under the Wilson Act, *supra*, p. 101; and of *Delameter v. South Dakota*, *supra*, p. 110

<sup>121</sup> See the comment on *Gwin, White and Prince, Inc. v. Henneford*, 305 U. S. 131 (1939), *infra*, p. 193. Cf. also the language of Justice Brewer in *Brennan v. City of Titusville*, 153 U. S. 289, 302 (1894), where, in holding invalid a city ordinance requiring licenses of solicitors of orders for goods to be shipped into the state, he stated that "it is settled that nothing which is a direct burden upon interstate commerce can be imposed by the State *without the assent of Congress*." (Italics mine.)

<sup>122</sup> *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U. S. 311, 332 (1917).

Congress may permit any valid nondiscriminatory measures which a state may choose to adopt in regulating local transactions to operate upon goods while still subject to federal jurisdiction. The revenue power of the state is coextensive with and hardly distinguishable from the state's police power. If Congress can remove the barrier of the commerce clause and permit a wider application of otherwise valid state police-power measures, it would seem to be within its competence to remove in a similar manner the same barrier against otherwise valid revenue measures of the states.

If subjection of interstate sales to nondiscriminatory state taxation is found to be within Congressional competence, it will have to be on the basis of the grant of power contained in the commerce clause. Such legislation cannot be sustained as an extension of Congressional consent to the levy of a state tax upon imports under the special consent clause of Article I, section 10, of the Constitution.<sup>133</sup> The Court has held that this clause has no application to interstate commerce.<sup>134</sup> Moreover, the Constitution requires that revenues thus derived in excess of costs of inspection must be paid into the federal treasury. Consent to state taxation of interstate sales under this clause would therefore fail to give the states the relief they desire, even if federal assent to such taxation were held warranted by it.<sup>135</sup>

<sup>133</sup> "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress."

<sup>134</sup> *Woodruff v. Parham*, 8 Wall. 123 (U. S.) (1869).

<sup>135</sup> Professor Edwin F. Aylesworth in "Congressional Assent to State Taxation Otherwise Unconstitutional," 17 *American Bar Association J.* 821 (Dec. 1931), offered the suggestion that Congress, in order to open up new sources of revenue to the states, might consent to state taxation of foreign imports and exports, and enter into an arrangement with the states by which a reallocation of fifty per cent of the amount collected in excess of costs would be made to the collecting state. He also suggested that Congress might give its consent to the levy of tonnage taxes by the states, and that, in the interstate sphere, it might submit sales to state taxation by the Wilson Act formula.

The objection to the first two suggestions is obvious. Such action would place the seaboard states in an advantageous position in relation to other states. It should be noted that in no instance has Congress given its consent to state taxation of imports or exports under the consent clause; and that consent to the levy of tonnage duties was confined to earlier decades when the states were permitted to exploit this source of revenue for purposes directly connected with



To sustain a regulatory act by Congress subjecting interstate transactions to the taxing power of the destination state would require to a certain extent a restatement and further clarification of the divestment theory. The divestment doctrine, as developed in the Wilson Act cases, holds that Congress, by defining the point at which an interstate transaction ceases to have the protection of the federal commerce power, submits to state control the "incidental" acts connected with such a transaction. Later, in sustaining the Webb-Kenyon Act, the Court upheld the authority of Congress to subject to state control an entire interstate transaction in a specified commodity by prohibiting the transaction when the intent is to violate laws of the destination state. The implication was that abdication of authority by Congress, in the one instance by fixing the point of termination of an interstate transaction involving a specified subject matter and in the other by de-legitimizing interstate commerce in it, terminated federal jurisdiction so far as the divestment extended. Divestment of interstate commerce for state taxation purposes, however, could obviously not terminate federal jurisdiction so completely as to render federal regulations under the commerce clause inoperative upon it. If divestment in aid of state tax laws resulted in complete denial of federal jurisdiction Congress would thereby surrender to the states practically its entire power over interstate commerce. Hence a divestment of subject matters for this purpose would necessarily have to be regarded as a recognition of a limited concurrent state authority over them. Divestment would not place them under complete and exclusive state control, but would leave them still within the range of federal regulatory power.

To sustain such a comprehensive federal divestment authority under the commerce clause the Court would have to restate the divestment theory in terms of a Congressional power to consent to the *imposition of a direct burden* on interstate commerce by the states. It would be impossible for the Court to cling to the rationalization of this type of legislation as a *fixation of the point at which interstate transactions shall be deemed terminated* in the constitutional sense. Congressional acquiescence in the application of state laws to specified subject matters would not imply a complete

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foreign commerce, that is, the support of state quarantine and health measures and the improvement of navigation facilities. These functions have since been largely assumed by the federal government.

withdrawal of federal jurisdiction over them, but rather a withdrawal of the protective effect of federal jurisdiction. Such a development in the theory of divestment would not be difficult for the Court to make, especially since certain decisions under the Wilson Act seem to have been based on this conception of the power to divest rather than on the theoretical principle advanced in the *Rahrer* case. To place the divestment power on this new basis would constitute a recognition of Congressional authority under the commerce clause to determine broadly the limits to which the states might proceed in imposing direct and indirect burdens upon interstate and foreign commerce. The definition of the limits of their authority in this regard would become in a fundamental sense a legislative function.

The trend toward subordination of judicial opinion to Congressional will in defining the limits of state power under the commerce clause is indicated in cases other than those arising under federal divestment legislation. Two recent pronouncements of the Court seem significant in this connection. In *Gwin, White and Prince, Inc. v. Henneford*,<sup>136</sup> the Court was required to pass upon the validity of a Washington business tax, measured by gross receipts, as applied to a concern engaged solely in the marketing of Washington-grown fruits by shipment to points outside the state. The Court held the tax to be inapplicable in the circumstances of the case, because it placed an unconstitutional burden upon the privilege of engaging in interstate commerce. Justice Stone, who gave the opinion of the Court, appeared willing to concede, however, that with the consent of Congress the state might levy such a tax upon an interstate business.<sup>137</sup> In other words, the prohibition

<sup>136</sup> 305 U. S. 434 (1939).

<sup>137</sup> *Ibid.*, pp. 438-439. "... But it is enough for present purposes that under the commerce clause, in the absence of Congressional action, state taxation, whatever its form, is precluded if it discriminates against interstate commerce or undertakes to lay a privilege tax measured by gross receipts derived from activities in such commerce which extend beyond the territorial limits of the taxing state." (*Italics mine*)

*Ibid.*, p. 441. "For more than a century, since *Brown v. Maryland*, 12 Wheat. 419, 445, it has been recognized that under the commerce clause, Congress not acting, some protection is afforded to interstate commerce against state taxation of the privilege of engaging in it... For half a century, following the decision in *Philadelphia and Southern S. S. Co. v. Pennsylvania*, 122 U. S. 326, it has not been doubted that state taxation of local participation in interstate commerce measured by the entire volume of the commerce, is likewise foreclosed. During

upon state action in this instance was one which Congress might override by express legislative provision.

A second significant judicial pronouncement is found in *South Carolina Highway Department v Barnwell Bros.*<sup>138</sup> Here the Court had under consideration the validity of a state departmental regulation relating to the width and weight of motor vehicles moving on the highways of the state. The applicability of the regulation to motor vehicles moving in interstate commerce was questioned under both the commerce clause and the guarantee of due process in the Fourteenth Amendment. In sustaining the validity of the regulation Justice Stone, again speaking for the Court, made the following statement:

Congress, in the exercise of its plenary power to regulate interstate commerce, may determine whether the burdens imposed on it by state regulation, otherwise permissible, are too great, and may, by legislation designed to protect the national interest in the commerce, curtail to some extent the state's regulatory power. But that is a legislative, not a judicial function, to be performed in the light of the Congressional judgment of what is appropriate regulation of interstate commerce, and the extent to which, in that field, state power and local interests should be required to yield to national authority and interest. In the absence of such legislation the judicial function, under the commerce clause as well as the Fourteenth Amendment, stops with the inquiry whether the state legislature in adopting regulations such as this has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought . . .

Here the first inquiry has already been resolved by our decisions that a state may impose nondiscriminatory restrictions with respect to the character of motor vehicles moving in interstate commerce as a safety measure and as a means of securing the economical use of its highways. In resolving the second, courts do not sit as legislatures, either state or national. They cannot act as Congress does when, after weighing all the conflicting interests, state and national, it determines when and how much the state regulatory power shall yield to the larger interests of a national commerce . . . . When the action of a legislature is within the scope of its power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of courts, but for the legislative body, on which rests the duty and responsibility of decision . . . . That is

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that period Congress has not seen fit to exercise its constitutional power to alter and abolish the rules thus judicially established." (Italics mine)

It should be noted that Butler and McReynolds, JJ., concurred only in the result in this case, and that Black, J., dissented. His dissent is discussed *infra*, p. 196.

<sup>138</sup> 303 U. S. 177 (1938).

equally the case when the legislative power is one which may legitimately place an incidental burden on interstate commerce. It is not any less a legislative power committed to the states because it affects interstate commerce, and courts are not any more entitled, because interstate commerce is affected, to substitute their own for the legislative judgment.<sup>139</sup>

This statement should, of course, be accorded no more significance than the circumstances of the case warrant. The Court was dealing with the principles governing state interference with interstate commerce in one specific field of regulation. It was careful to concede to Congress authority to tolerate or terminate state regulations constituting only *incidental* burdens on interstate motor-vehicle traffic. It did not go so far as to admit that *any* regulations set up by the states with the implied permission of Congress would be held valid. The purpose of the Court may have been merely to emphasize Congressional responsibility for establishing a nationwide, uniform system of regulation in this field. Notwithstanding all these considerations, this pronouncement is very illuminating in its acknowledgment of the difference between the judicial approach and the legislative approach in regard to questions of state interference with interstate commerce. A judicial attitude such as that expressed in this case indicates a readiness to concede to Congress great responsibility in defining the scope of state authority in the interstate sphere. This is true even though the Court may be willing to permit Congress to assume the initiative only to a limited extent.

In judicial decisions which paved the way for the enactment of divestment legislation by Congress, the attitude of the Court was. The state regulations in question are *void*, unless Congress rules otherwise. In the South Carolina case the Court's attitude was. The state regulations in question are *valid*, unless Congress rules otherwise. If the latter attitude is adopted by the Court toward a widening range of subject matters, it will mean the vesting of primary responsibility in Congress to prevent state interference with interstate and foreign commerce. To the degree that this is done, the theory of a concurrent state and national power in the regulation of commerce, as advanced by Chief Justice Taney,<sup>140</sup> will have been revived.

The dissenting opinions of certain members of the Court in several recent state taxation cases point even more unmistakably

<sup>139</sup> *Ibid.*, pp. 189-191

<sup>140</sup> See *supra*, pp. 27 ff.

toward a judicial surrender to Congress of the initiative in protecting national commercial interests against state encroachments. Justice Black has vigorously maintained that the commerce clause, per se, should not be enforced as a limitation upon state power to tax, unless a clear discrimination against interstate commerce can be shown; and that interstate business should enjoy an immunity against nondiscriminatory state tax measures only through express provision by Congress to that effect.<sup>141</sup> The dissent in a recent ruling by the Supreme Court indicates that Justice Black has gained two converts to his idea of placing primary responsibility upon Congress in defining the limits of state taxing authority with reference to interstate business. The issue under consideration was the validity of an Arkansas gasoline tax upon fuel over a specified amount in the tanks of motor vehicles entering the state. The state sought to apply the tax upon the vehicles of a motor-bus company operating through Arkansas between points in Tennessee and Missouri. In the circumstances of the case the tax was held void as a direct burden upon interstate commerce.<sup>142</sup> Justices Black, Frankfurter, and Douglas refused to follow the majority. In their dissenting opinion the following language appeared:

... As both the Union and the States are more and more dependent upon the exercise of their taxing power for carrying on government, it becomes more and more important that potential conflicts between state

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<sup>141</sup> Cf. his dissenting opinions in *Adams Manufacturing Co. v. Storen*, 304 U. S. 307, 316 (1938), and *Gwin, White and Prince, Inc. v. Henneford*, 305 U. S. 431, 442 (1939). In both these cases the Court held state business taxes based on gross receipts inapplicable to receipts arising from interstate transactions. In the latter case Justice Black stated his position in the following words (p. 455): "It is essential today, as at the time of the adoption of the Constitution, that commerce among the States and with foreign nations be left free from discriminatory and retaliatory burdens imposed by the States. It is of equal importance, however, that the judicial department of our government scrupulously observe its constitutional limitations, and that Congress alone should adopt a broad policy of regulation—if otherwise valid state laws combine to hamper the free flow of commerce.... I would return to the rule that—except for state acts designed to impose discriminatory burdens on interstate commerce because it is interstate—Congress alone must 'determine how far [interstate commerce] . . . shall be free and untrammelled, how far it shall be burdened by duties and imposts, and how far it shall be prohibited.'" (Quoting *Welton v. Missouri*, 91 U. S. 275, 280.) For comment on Justice Black's views see Traynor, *op. cit.*, and the note on the case, "Gross Income Taxes on Interstate Commerce," 39 *Columbia Law Rev.* 864 (May, 1939).

<sup>142</sup> *McCarroll v. Dixie Greyhound Lines, Inc.*, 309 U. S. 276 (1940).

and national powers should not be found where Congress has not found them, unless conflict is established by demonstrable concreteness. .

Judicial control of commerce—unlike legislative regulations—must from inherent limitations of the judicial process treat the subject by the hit and miss method of deciding single local controversies upon evidence and information limited by the narrow rules of litigation. Spasmodic and unrelated instances of litigation cannot afford an adequate basis for the creation of integrated national rules which alone can afford that full protection for interstate commerce intended by the Constitution. We would, therefore, leave the questions raised by the Arkansas tax for consideration of Congress in a nation-wide survey of the constantly increasing barriers to trade among the States. Unconfined by the "narrow scope of judicial proceedings" (see Mr. Chief Justice Taney, dissenting, *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 13 How. 518, 592) Congress can, in the exercise of its plenary constitutional control over interstate commerce, not only consider whether such a tax as now under scrutiny is consistent with the best interests of our national economy, but can also on the basis of full exploration of the many aspects of a complicated problem devise a national policy fair alike to the States and our Union.<sup>143</sup>

The implications of even so limited an acknowledgment of authority in Congress as appears to be contemplated by the dissenting minority in this case are quite far-reaching. Recently a former Assistant Attorney General employed this statement in the minority opinion as a springboard for considering the possibility of a complete withdrawal by the Court from its rôle of guardian over national commercial interests through enforcement of the commerce clause as a limitation on state power.<sup>144</sup> His conclusions may be summarized as follows: (1) the Supreme Court would no longer hold state action invalid on the ground of conflict with the commerce clause, per se, but only on the ground of conflict with positive federal enactments or express prohibitions; (2) there would be no occasion for federal legislation affirmative of state action, such as the Wilson Act; (3) it would be necessary to recognize power in Congress to prohibit state regulations without establishing positive regulations of its own; (4) while the Court would not have power to invalidate state action without a prior mandate of Congress, it would retain the right to hold state action valid if it found that Congress had exceeded its own power to define the jurisdiction of the states; (5) in view of the

<sup>143</sup> *Ibid.*, pp. 186, 188-189.

<sup>144</sup> John Dickinson, "The Functions of Congress and the Courts in Umpiring the Federal System," 8 *George Washington Law Rev.* 1165 (June, 1940). On this same general question see also Breck P. McAllister, "Court, Congress and Trade Barriers," 16 *Indiana Law J.* 144 (Dec., 1940).

inherent shortcomings in the legislative process, the long-established practice of relying upon the Court rather than upon Congress to restrain the states, and the current resurgence of local protectionism as manifested in the enactment of state trade-barrier legislation, it would be undesirable for the Court, in anticipation of appropriate legislation by Congress, to resign at once its protective function wholly to Congress; and (6) by way of preparation for any ambitious attempt on the part of Congress to enact a code of law on state power over interstate commerce to serve as a basis for future judicial invalidation of state laws in this field, a careful, comprehensive survey of the present law as developed by judicial decision should be made by a staff of competent economists and legal experts.

These conclusions are, on the whole, sound regarding the situation that would ensue and the course that should be followed in dealing with it if the Court should resign to Congress the function of defining state powers in relation to interstate and foreign commerce. The inference that any member of the Court is contemplating so revolutionary a change in constitutional doctrine is, however, unwarranted. It should be noted that the dissenting minority in the *McCarroll* case did not propose to abandon the practice of annulling state legislation under the commerce clause when conflict could be established "by demonstrable concreteness"<sup>145</sup>. Even if the Court should follow the rule of relying only upon express Congressional enactments as a basis for invalidating state laws, a very considerable leeway of interpretation would still be possible in applying them as limitations on state power. If so minded, the Court could define narrowly the powers of the states on the basis of the necessarily general legislation which Congress might enact. In construing positive federal enactments the doctrine of "occupation of the field" could be applied broadly to limit state action more than was intended by Congress. Implied limitations could be derived from federal regulations of a purely negative sort, so as to achieve the same result. Consequently there would still be need of remedial federal legislation to bring about the release of state

<sup>145</sup> Cf. the unanimous opinion of the Court, presented by Justice Frankfurter, in *Hale v. Bunco Trading Co.*, 306 U. S. 375 (1939). In this case the Court invalidated a Florida statute setting up an inspection requirement, coupled with a fee sixty times the cost of inspection, upon cement imported into the state. The statute was declared void as a "calculated discrimination against foreign commerce...designed.. to circumvent what the Commerce Clause forbids" *Ibid.*, p. 380.

power. Moreover, there would remain the limitations of the Fourteenth Amendment as a basis for overruling state legislation in the absence of conflict with specific federal statutes. Whatever controlling authority the Court may be willing to concede to Congress in defining state power under the commerce clause, it has given no indication of a similar willingness to permit Congress to define the limits of the guarantees of the Fourteenth Amendment with reference to state action. The limits of the powers of Congress under the commerce clause would also remain a matter for final judicial determination.

The decisions of the Court sustaining the authority of Congress to submit specific subject matters to state control by divestment may be viewed, in the broadest sense, as precedents pointing the way toward judicial acceptance of a larger measure of legislative responsibility in defining the scope of state authority under the commerce clause. How far the Court will go in this direction remains to be seen. Progress should be made only as Congress manifests a disposition to accept responsibility as the guardian of national interests against selfishly inspired local regulations. To the degree that the will of the national lawmaking body is substituted for that of the Court in this regard, the method for adjusting federal and state power apparently envisioned by the framers of the Constitution in this sphere will be realized.



## CHAPTER VI

### DIVESTMENT BY LEGISLATIVE PROHIBITION: THE WEBB-KENYON ACT

JUDICIAL limitation of the scope of the Wilson Act produced an immediate reaction. A movement to amend or supplement this statute began in Congress directly after the Supreme Court's adverse decision in the first *South Carolina Dispensary Law Case*.<sup>1</sup> As successive court rulings continued the process of whittling away the concession of power to the states made by the Wilson Act, pressure for remedial legislation persisted in Congress. The eventual outcome, after a fifteen-year struggle, was the passage of the Webb-Kenyon Act, by which Congress prohibited the introduction of intoxicating liquors into a state with the intent to violate its laws relating to their receipt, possession, sale, or use. This legislation originated a new formula for divesting interstate and foreign commerce of federal protection. Under the Wilson Act Congress had exercised an authority to submit to state control an incidental part of an interstate transaction, the right of sale in the original package. By the later act Congress achieved the subjection of an entire interstate transaction to the control of a destination state.

#### 1. THE ORIGIN OF THE WEBB-KENYON ACT

THE struggle for the enactment of legislation supplementing the Wilson Act was marked by bitter controversy. To an even greater degree than was the case with the Wilson Act uncertainty and disagreement were evident in the lawmaking branch of the national government over the question of the constitutionality of the measure eventually enacted. In contrast with the plain invitation to Congress to act given by the Supreme Court in cases preceding the passage of the Wilson Act, judicial pronouncements during this period of controversy threw little light upon the question whether Congress might by permissive legislation further broaden the scope of state authority over such transactions. Much less were there hints

<sup>1</sup> *Scott v. Donald*, 165 U. S. 58 (1897); see *supra*, p. 106.

as to how Congress might proceed to deal with the situation. On the contrary, there had been offered *dicta* which raised seemingly impassable constitutional barriers to any further extension of state power.

In *Rhodes v. Iowa* <sup>2</sup> and in *Vance v. Vandercook Company* <sup>3</sup> the Court had appeared to place the right to introduce liquors into a state for personal use on a constitutional foundation which precluded any Congressional attempt to extend state power in this direction. In the *Rhodes* case, when construing the term "upon arrival" in the Wilson Act to mean "delivery to the consignee," the Court had pointedly refrained from committing itself on the question whether Congress might permit state power to attach to such shipments prior to that point in the transaction. The Court did, however, proceed to distinguish between what it considered to be "fundamentals" and "incidents" of interstate commerce. It thus created the impression that the Wilson Act was sustainable only because it submitted an "incidental" right of sale to state control, and that had it done more a constitutional right would have been infringed.<sup>4</sup>

In *Vance v. Vandercook Company*, despite the fact that the Wilson Act by its terms had subjected intoxicating liquors to state control upon arrival when imported into a state for "use, consumption, sale or storage therein," the law was not construed to give the state

<sup>2</sup> 170 U. S. 412 (1898).

<sup>3</sup> 170 U. S. 438 (1898).

<sup>4</sup> 170 U. S. 412, 419: "The fundamental right which the decision in the Bowman case held to be protected from the operation of state laws by the Constitution was the continuity of shipments of goods coming from one State into another from the point of transmission to the point of consignment, and the accomplishment there of the delivery covered by the contract."

And *ibid.*, p. 424: "Whilst it is true that the right to sell free from state interference interstate commerce merchandise was held in *Leisy v. Hardin* to be an essential incident to interstate commerce, it was yet but an incident, as the contract of sale within a State in its nature was usually subject to the control of the legislative authority of the State. On the other hand, *the right to contract for the transportation of merchandise from one state into or across another involved interstate commerce in its fundamental aspect, and imported in its very essence a relation which necessarily must be governed by laws apart from the laws of the several States, since it embraced a contract which must come under the laws of more than one State.* The purpose of Congress to submit the incidental power to sell to the dominion of state authority should not without the clearest implication be held to imply the purpose of subjecting to state laws a contract which in its very object and nature was not susceptible of such regulation even if the constitutional right to do so existed, as to which no opinion is offered." (Italics mine.)

authority to interfere with a "constitutional" right to import for personal use. At three different points in the opinion the Court asserted that this was a right derived from the Constitution, and thus created the impression that Congressional action would be of no avail to submit this right to state control.<sup>5</sup>

Finally, in one of the later Wilson Act cases, after a review of the results of decisions delimiting state authority over interstate shipments of intoxicating liquors under the commerce clause, the Court declared categorically that beer and other intoxicating liquors were recognized subjects of interstate commerce; that it was not "competent" for states to forbid any common carrier to transport such articles from a consignor in one state to a consignee in another; and that, until such transportation was concluded, such commodities did not become subject to state regulations restraining their sale or disposition.<sup>6</sup>

In the face of these discouraging pronouncements by the Supreme Court agitation for further enabling legislation by Congress continued. The proposals to deal with the problem offered in Congress in the fifteen years preceding the passage of the Webb-Kenyon Act were, broadly speaking, of three types, depending upon the degree to which state legislation was to be taken into consideration in achieving a solution. First, there were those proposals which aimed at amending or supplementing the Wilson Act by further depriving interstate shipments of intoxicating liquors of the protection of the commerce clause, or by subjecting carriers and shippers to state regulation in handling such shipments. Some of these proposals were in the form of amendments to the Wilson Act, moving forward the point of operation of state power to cover

<sup>5</sup> 170 U. S. 438, 452 (1898): "It follows that under the Constitution of the United States every resident of South Carolina is free to receive for his own use liquor from other States and that the inhibitions of a state statute do not operate to prevent liquors from other States from being shipped into such State, on the order of a resident for his use."

*Ibid*, pp. 452-453: "But the right in one State to ship liquor into another State to a resident for his own use is derived from the Constitution of the United States, and does not rest upon the grant of the state law."

And *ibid.*, p. 455: "The right [to engage in interstate commerce] arises from the Constitution of the United States; it exists wholly independently of the will of either the law-making or the executive power of the State; it takes its origin outside of the State of South Carolina, and finds its support in the Constitution of the United States."

<sup>6</sup> *Louisville and Nashville R. R. Co. v. Cook Brewing Co.*, 223 U. S. 70, 82 (1912).

delivery of shipments or even to cover their movement from the moment of crossing the state boundary line. Other proposals of this type would have obligated carriers and shippers to abide by the regulations of destination states in the transportation and delivery of intoxicants. Still others would have caused C.O.D. shipments to be regulated by the state of destination. In other words, these proposals aimed at a legislative definition of an interstate transaction so as to extend forward in point of time the operation of state laws upon it.

Another group of proposals looked toward positive federal regulation of such commerce, but with a view to dovetailing national legislation with the varying policies of the states of destination. Among these were proposals prohibiting the transportation of intoxicating liquors by carriers for delivery in a prohibition state, prohibiting C.O.D. shipments into a state in violation of its laws; prohibiting the issuance of federal liquor licenses for dealers and manufacturers in prohibition states; or imposing an obligation upon federal licensees and interstate carriers to submit their books and records to examination by state and local officers to aid in the enforcement of state liquor laws.

Still another type of proposal looked toward federal regulation of interstate commerce in intoxicating liquors without reference directly to state policies and regulations, although supporting them indirectly. Among such proposals were bills to prohibit the carriage of liquors through the mails, to prohibit altogether C.O.D. shipments of intoxicants; or to deny completely the facilities of interstate commerce to the liquor trade. The more extreme prohibition element continued, meanwhile, to press for the submission of a constitutional amendment establishing an absolute prohibition of the manufacture, transportation, and sale of intoxicating liquors for beverage purposes.

As subsequent events proved, one or more measures of each of these types was given favorable consideration in Congress. As the tide of public opinion rose against the liquor traffic milder regulations designed to supplement state policies were followed by the adoption of a policy of active coöperation in suppression of the interstate movement of liquors into dry states. Finally the anti-liquor movement culminated in the adoption of wartime prohibition by Congressional act and the "noble experiment" of the Eighteenth Amendment. The history of the adoption of permissive legislation

supplementing the Wilson Act was closely intertwined with the movement to advance the cause of regulation through these other means. Attraction of support to alternative methods of regulation had an important influence on the amount of backing which the proposals based on a divestment procedure could command. Attention must be given, therefore, to the legislative background out of which the Webb-Kenyon Act evolved.

Immediately after the Supreme Court, in 1897, first construed narrowly the terms of the Wilson Act,<sup>7</sup> Senator Tillman, of South Carolina, introduced a bill proposing to amend the law in two important particulars. His bill<sup>8</sup> was designed to make intoxicating liquors subject to state power upon arrival *within the limits* of a state. It also provided that liquors should not be exempt from state power by reason of being introduced in original packages *for private use* or otherwise. An additional clause would have given the states "absolute control of such liquors or liquids within their borders, by whomsoever produced and for whatever use imported." Saving clauses were included to the effect that the proposed act should not be construed to affect the internal-revenue laws of the United States or to authorize state interference with liquors in transit to another state.<sup>9</sup>

The bill was reported favorably by the Senate Judiciary Committee<sup>10</sup> and was passed by the Senate.<sup>11</sup> In the next session it was reported out by the House Committee on the Judiciary;<sup>12</sup> but notwithstanding a second report by the Senate Judiciary Committee urging its passage as a means of giving full effect to the purpose embodied in the Wilson Act,<sup>13</sup> it was not taken up. An attempt to

<sup>7</sup> *Scott v. Donald*, 165 U. S. 58 (1897), holding that a state might not restrict importation of liquor for personal use while permitting unlimited sale for this purpose through the state's dispensaries.

<sup>8</sup> S. 224, introduced on March 16, 1897, 55th Cong., 1st Sess.

<sup>9</sup> The text of the proposal is given in *Cong. Rec.*, 55th Cong., 1st Sess., p. 2612.

<sup>10</sup> *S. Rept.* 151, 55th Cong., 1st Sess.

<sup>11</sup> *Cong. Rec.*, 55th Cong., 1st Sess., p. 2612. The discussion of the measure, which was in committee of the whole, was not reported in the *Record*.

<sup>12</sup> *H. Rept.* 667, 55th Cong., 2d Sess.

<sup>13</sup> *S. Rept.* 461, 55th Cong., 2d Sess. This report was in response to a resolution by Senator Tillman requesting a study of what measures should be adopted to achieve completely the objective of the Wilson Act, after it had become evident that the House was unlikely to pass any of the measures then under consideration for amending that act. See S. Res. 119, *Cong. Rec.*, 55th Cong., 2d Sess., p. 671.

secure House action on a companion measure introduced by Representative Latimer, of South Carolina, also failed when objection was made to immediate consideration.<sup>14</sup>

The decisions of the Supreme Court the next year in *Rhodes v. Iowa*<sup>15</sup> and *Vance v. Vandercook Company*,<sup>16</sup> which apparently placed the right of importation for personal use upon a "constitutional" basis, caused serious doubts to arise concerning the power of Congress to go further than it had gone in the Wilson Act in subjecting imported liquors to state control. At the same time they brought about greater enforcement difficulties for the states in the vanguard of the prohibition movement. Although no divestment bills were introduced in the next Congress, the growing seriousness of the problem of liquor-law enforcement in the prohibition states led to another attempt to amend the Wilson Act in the Fifty-seventh Congress. On June 30, 1902, near the end of the first session of this Congress, Representative Hepburn, of Iowa, introduced a bill<sup>17</sup> similar to the abandoned Tillman Bill in that it attempted to modify the Wilson Act by moving forward the point of operation of state power upon interstate shipments of liquors.

In original form the Hepburn Bill proposed to subject intoxicating liquors to state authority "upon entering or upon arrival within the boundary of" a state, with no further change from the language of the Wilson Act. The Senate Committee on the Judiciary, in reporting the measure, recommended certain changes in its content. The committee report proposed to leave the Wilson Act unaltered, and to add as a completely new provision the matter incorporated in the Hepburn Bill. This would eliminate any question of repeal of the earlier act, and would save it in case the amendatory measure was not sustained by the Courts. The committee also recommended a change in the wording of the bill to cause it to provide that intoxicating liquors should become subject to state police power "upon arrival within the boundary of such State . . . before and after delivery"; and the addition of a section making carriers and shippers engaged in the liquor traffic subject to the laws of the state of destination.<sup>18</sup>

<sup>14</sup> H. R. 3495, 55th Cong., 1st Sess., introduced on June 21, 1897.

<sup>15</sup> 170 U. S. 412 (1898); see *supra*, p. 107.

<sup>16</sup> 170 U. S. 438 (1898), see *supra*, p. 108.

<sup>17</sup> H. R. 15331, 57th Cong., 1st Sess.

<sup>18</sup> H. Rept. 3377, 57th Cong., 2d Sess. The report, which was unanimous,

When taken up for debate on the floor, the measure was explained by its supporters as a proposal to enlarge state power only in respect to the regulation of the importation of liquors for sale. An intention to subject to state control the right to import for personal use was denied by the bill's sponsors, who pointed to the constitutional barrier to such action which had been raised by the Supreme Court in the *Rhodes* and *Vandercook* cases.<sup>19</sup> This explanation of the purpose and scope of the bill apparently satisfied the constitutional scruples of most of the House members. Although some protest was made that the bill permitted an unwarranted extension of state power over interstate commerce,<sup>20</sup> after a brief debate it was passed by the House on January 27, 1903, without a record vote.<sup>21</sup> It failed to be reported out in the Senate. The Hepburn Bill was again reported upon favorably by the House Committee on the Judiciary in the Fifty-eighth Congress,<sup>22</sup> but no further action was taken by the House. Hearings were conducted by the Senate Committee on Interstate Commerce on a companion bill introduced in the Senate by Senator Dolliver, of Iowa,<sup>23</sup> but increasing doubt concerning the power of Congress to extend state authority over interstate commerce beyond the limits set by the Wilson Act prevented favorable action.

Judicial overthrow of state efforts to reach the interstate liquor traffic by regulation of C.O.D. sales<sup>24</sup> led to a renewal of the fight

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described the amended measure as "a proposition to surrender back to the states certain control which was given by the Federal Constitution, under the commerce clause to Congress, the exercise of which power has, according to these decisions [of the Supreme Court] . . . nullified the police regulations of the States"

<sup>19</sup> See the statement of Representative Clayton, of Alabama, *Cong Rec*, 57th Cong., 2d Sess., p. 1328.

<sup>20</sup> Objections on this ground were voiced by Representatives Bartholdt, of Missouri, and Kleberg, of Texas, *ibid*, pp. 1328, 1330.

<sup>21</sup> *Ibid.*, p. 1331.

<sup>22</sup> *H. Rept.* 2337, 57th Cong., 2d Sess., on H. R. 4072. The report, conceding that on the basis of judicial opinions the right of an individual to import liquors for personal use was a "constitutional right of which he cannot be deprived by any legislative enactment," proposed the addition of a saving clause definitely exempting from the operation of the measure through shipments and "bona fide shipments for personal use, and not intended for sale, in the state of destination." *Ibid*, p. 3.

<sup>23</sup> See *S. Docs.* 168 and 309, 58th Cong., 2d Sess., which report hearings on S. 1390 held on Feb 25 and April 27, 1904.

<sup>24</sup> *American Express Co. v. Iowa*, 196 U. S. 133 (1905), *Heyman v. Southern Ry. Co.*, 203 U. S. 270 (1906), *Adams Express Co. v. Kentucky*, 206 U. S. 129 (1907).

to obtain additional legislation by Congress sanctioning the extension of state power over such sales or regulatory legislation by Congress restricting transactions of this nature. From a variety of bills introduced on the subject in the Fifty-ninth Congress two were reported out in the House. One of these was a measure introduced by Representative Brantley, of Georgia,<sup>25</sup> making carriers subject to the laws of a destination state in the delivery of C.O.D. shipments of liquor. The other was a bill sponsored by Representative Littlefield, of Maine.<sup>26</sup> Like the earlier Hepburn-Dolliver Bill, the Littlefield Bill proposed to deal with the problem through a revision of the Wilson Act pushing forward the point at which state power might begin to operate on interstate liquor shipments. In the voluminous reports submitting these bills to the House a great diversity of opinion on the constitutionality of the accompanying measures was revealed. In view of this wide disagreement within the Judiciary Committee itself it is not surprising that neither the Littlefield Bill nor the less drastic Brantley Bill was taken up for consideration by the House. The Senate did not concern itself with the problem during this session.

The issue would not stay down. In the next Congress over fifty liquor-control bills were introduced, of which twenty-one contemplated subjection of interstate traffic in liquors to state control in one way or another. After some prodding by advocates of divestment legislation, a subcommittee of the Senate Judiciary Committee made a report upon pending Senate divestment bills.<sup>27</sup> The committee placed a bill of this character before the Senate for consideration, but the accompanying subcommittee report did not favor its passage.

Senator Knox, with whom Senator Fulton, of Oregon, and Senator Rayner, of Maryland, the other members of the subcommittee, were substantially in agreement, stated his conclusions on the question in the following words:

First. Interstate shipments are not completed until they reach the consignee.

Second. An interruption or interference with interstate shipments before they reach the consignee constitutes a regulation of commerce

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<sup>25</sup> H. R. 16179, introduced on March 9, 1906; *H. Rept.* 1769, 59th Cong., 1st Sess.

<sup>26</sup> H. R. 13655, introduced on Jan. 31, 1906, *H. Rept.* 6708, 59th Cong., 2d Sess.

<sup>27</sup> *S. Rept.* 499, 60th Cong., 1st Sess.



- Third. Regulating an interstate shipment is an exclusive function of Congress.
- Fourth. Congress can not delegate any part of its exclusive power to the States.
- Fifth. To remove the bar or impediment of exclusive Federal power which shuts the States out of the Federal domain and thereby allow them to enter that domain is to permit or sanction a state law in violation of the Constitution and in effect to delegate a Federal function to the States.<sup>28</sup>

The opinion was also expressed that, so long as the states did not prohibit possession or use of intoxicating liquors, it would likewise be improper for Congress to forbid interstate commerce in them.<sup>29</sup> Other members of the committee, giving their views individually in the report, offered a wide variety of opinions on the question of the constitutional authority of Congress to enlarge further the power of the states over interstate commerce in liquors.

The substitute bill brought forward by the committee failed to be taken up for consideration, owing to the indisposition of Senator Knox, the chairman of the Judiciary Committee, to support it.<sup>30</sup> No action by the House was taken on any of the numerous divestment bills introduced in that body. The unfavorable report by the subcommittee had apparently killed the movement for further divestment legislation by Congress. Attention was temporarily given to measures proposing to extend aid to the prohibition states along the line of direct federal regulation of C.O.D. shipments of liquors in interstate commerce. Favorable action was taken upon a proposal of this nature and also upon one excluding shipments of liquors from the mails.<sup>31</sup>

<sup>28</sup> *Ibid.*, pp 7-8.

<sup>29</sup> *Ibid.*

<sup>30</sup> While the Senate Judiciary Committee was making its study of the problem Senator Clay, of Georgia, offered as a rider to a bill dealing with the subject of ocean mail service a section subjecting interstate commerce in intoxicating liquors to state control under the plan embraced by the earlier Hepburn-Dolliver Bill. After assurance from the chairman of the Judiciary Committee that the subject was being considered by that committee and a report would be made upon it, Senator Clay withdrew his amendment. He indicated that, if no divestment bill was reported, he would offer his amendment as a rider to other bills. *Cong. Rec.*, 60th Cong., 1st Sess., p. 3647. The amendment was not brought to a vote at a later time.

<sup>31</sup> When the Penal Code Revision Bill of 1909 was under consideration in the House Representative Humphreys, of Mississippi, offered an amendment to it making illegal the knowing delivery by any carrier of intoxicating liquors to any person other than the person to whom consigned, unless by written order of

It soon became evident that these measures adopted by the federal government to assist the prohibition states were ineffective in meeting the problem. Though none of the numerous bills introduced in the Sixty-first Congress to deal further with the interstate shipment problem was considered, the conviction was growing that some sort of additional remedial legislation would have to be enacted by Congress.

Among the suggestions brought forward was one that Congress might regulate commerce in liquors by prohibiting their introduction into a state with the intent to violate its laws. Such action, it was pointed out, would cause these prohibited shipments to become completely subject to state power as "outlawed" articles of commerce. This idea developed through a line of reasoning based on earlier federal statutes and judicial pronouncements. *Dicta* of the Supreme Court in the *Bowman* and *Leisy* cases had intimated that it was recognition by Congress of intoxicating liquors as "legitimate" articles of commerce which prevented the application of state laws to them while still under federal jurisdiction.<sup>32</sup> The debate in the Senate on the Wilson Bill had developed the view that Congress by that measure was merely exercising a power to declare intoxicating liquors not to be legitimate subjects of commerce, which would permit state regulations to reach them while still in the original package in the hands of the importer.<sup>33</sup> The Supreme Court, however, had placed a different construction upon the act. In spite of this fact, the idea of a Congressional de-legitimization of commerce in intoxicating liquor had not been

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the consignee, forbidding delivery to any fictitious person or to any person under a fictitious name; prohibiting persons from collecting the purchase price in an interstate sale or acting as the agent of a buyer or a seller unless actually engaged in the transportation or delivery of such shipments; and requiring the labeling of liquor packages in interstate commerce to disclose the name of the consignee and the nature of the contents of the packages. The amendment was adopted, as was one by Representative Houston, of Tennessee, excluding shipments of liquor from the mails *Cong Rec.*, 60th Cong., 2d Sess., pp. 342, 346-354, 2583-2585, 2649. The Senate Judiciary Committee was agreeable to the inclusion of these provisions in the bill, and they became a part of the completed measure Act of March 4, 1909, c. 321, secs. 238-240, 35 *Stat.* 1136. These provisions in amended form are now found in 68 *U. S. C. A.* (1910 Supp.), secs. 338-340. The provision excluding liquors from the mails merely legalized an existing regulation of the Post Office Department, but the provisions relating to C.O.D. shipments were new.

<sup>32</sup> See *supra*, pp. 71, 77.

<sup>33</sup> See *supra*, p. 91.

lost sight of.<sup>34</sup> The suggestion that Congress might declare intoxicating liquors not to be legitimate subjects of interstate commerce only when they were intended to be disposed of in a state in violation of its laws was a further development of this concept.

The idea that Congress might partly de-legitimize commerce in intoxicating liquors, conditioning its action upon intent to violate the laws of the state of destination, was brought prominently to the attention of Congress by an attorney, Fred S. Caldwell, a former liquor-law enforcement officer of the state of Oklahoma.<sup>35</sup> According to his statements, he reached the conclusion that Congress might deal with intoxicating liquors in this manner after he had studied the Senate Judiciary Committee report on divestment bills in the Sixtieth Congress. This report emphasized the point that Congress might not permit further extension of state power over interstate shipments of intoxicating liquors so long as they were regarded as legitimate subjects of commerce.<sup>36</sup> He had also considered the method of regulation which Congress had employed in the Lacey Act of 1900. He concluded that, if Congress could coördinate its regulation of the shipment of game with state policy by prohibiting shipment of game *from* a state when killed in violation of state law, it might, by reversing the process, support state policy by prohibiting the shipment of intoxicating liquors *into* a state for the purpose of violating its laws. Prohibition of such commerce would have the effect of permitting the states to apply their laws to it, since by the Congressional prohibition this commerce would have lost its legitimate character.<sup>37</sup>

<sup>34</sup> For an argument supporting the proposition that Congress might legislate to deprive intoxicating liquors of their commercial character and thus subject them completely to state police authority see Frederick Hale Cooke, "What Legislation by Congress Is Desirable to Give Effect to State Liquor Legislation?" 22 *Green Bag* 10 (Jan., 1910)

<sup>35</sup> See S. Doc. 488, 62d Cong., 2d Sess., pp. 3-25, a report of his statements before the Senate Judiciary Committee favoring the passage of the legislation later adopted as the Webb-Kenyon Act; and also the report of his testimony before the House Committee on the Judiciary on the Webb Bill, *Cong. Rec.*, 62d Cong., 2d Sess., pp. 2796-2804. In his testimony before the Senate Judiciary Committee Caldwell claimed authorship of the bill introduced by Senator Kenyon, and both Senator Kenyon and Representative Clayton acknowledged him as the author of the original drafts of the Webb and Kenyon bills. *Cong. Rec.*, 62d Cong., 3d Sess., pp. 761, 2796.

<sup>36</sup> See *supra*, p. 118

<sup>37</sup> Another statute which would have been closely in point as a precedent was the Act of Feb. 28, 1803, 2 *Stat.* 205, forbidding the importation of slaves

The advancement of this proposal injected new life into the movement for the passage of additional divestment legislation by Congress. On February 7, 1913, in the third session of the Sixty-second Congress the House Judiciary Committee reported a bill introduced by Representative Webb, of North Carolina, proposing to prohibit interstate commerce in intoxicating liquors when intended to be "received, possessed, sold, or used" in violation of the laws of the destination state.<sup>38</sup> The report recommended certain changes in the original draft of the bill, which contained not only the prohibition upon shipment of liquors into a state in violation of its laws, but also a clause declaring null and void "any and all contracts pertaining to such transactions" and withdrawing from federal courts jurisdiction over suits arising from them.<sup>39</sup> The original bill would thus in effect have provided a penalty for violation of its terms by making impossible legal recovery of any liquors falling under the federal ban, when seized by state authorities. The committee recommended striking out the second clause, and also proposed other minor changes in the wording of the bill.

Two minority reports were submitted. One, signed by three members of the committee, questioned the power of Congress to extend state power over interstate commerce further than had been done in the Wilson Act. The members signing this part of the report were willing, however, to resolve their doubts in favor of the proposal under consideration, provided clauses were added imposing penalties for violation of its provisions and exempting from state authority importations for personal use and shipments in transit through a state.<sup>40</sup> A second minority report signed by three members disapproved of the proposed bill altogether as an attempted delegation of exclusive federal power to the states.<sup>41</sup>

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into any state which prohibited their introduction. This was not a "divestment" measure in the same sense as the Webb-Kenyon Act, since there was a federal penalty attached for its violation, and at the time of its passage the states possessed an acknowledged constitutional authority to prohibit the introduction of such persons. This statute was cited later in the debates on the Webb-Kenyon Bill as affording a precedent for the legislation under consideration.

<sup>38</sup> *H. Rept.* 1461, 62d Cong., 3d Sess., on H. R. 17593

<sup>39</sup> *Cong. Rec.*, 62d Cong., 3d Sess., p. 2789

<sup>40</sup> *H. Rept.* 1461, 62d Cong., 3d Sess., Part II, pp. 1-5. This part of the report was signed by Representatives John W. Davis, of West Virginia, Howland, of Ohio, and Floyd, of Arkansas.

<sup>41</sup> *Ibid.*, p. 8. This minority report was signed by Representatives Moon, of Pennsylvania, Dupre, of Louisiana, and McCov, of New Jersey.

In the face of a vigorous fight by the opposition, who raised various constitutional objections,<sup>42</sup> supporters of the committee bill were able to secure its passage in the House in the form recommended in the majority report. After a day of debate the bill was passed by a vote of 239 to 64.<sup>43</sup> Amendments exempting shipments for personal use were rejected,<sup>44</sup> as well as a proposal to attach a penalty clause making violations punishable by fine or imprisonment.<sup>45</sup>

The Senate was slower to act. On July 23, 1912, near the close of the second session of the Sixty-second Congress, the Senate Judiciary Committee reported out a bill introduced by Senator Kenyon, of Iowa.<sup>46</sup> The committee report recommended important changes in the original draft. The first section of the bill as reported embraced substantially the language of the Webb Bill in the form passed by the House. Addition of a second section was proposed revising the terms of the Wilson Act along the line suggested in the earlier Hepburn-Dolliver Bill.<sup>47</sup> The Senate proposal was therefore an attempt to combine two methods of treatment: (1) prohibition of commerce in liquors introduced into a state with an intent to violate its laws respecting receipt, possession, sale, or use; and (2) subjection of all intoxicating liquors to state control upon entry into the state without reference to intended disposition.<sup>48</sup>

<sup>42</sup> The argument on the constitutionality of the bill is summarized later; see *infra*, pp. 217-222.

<sup>43</sup> *Cong. Rec.*, 62d Cong., 3d Sess., p. 2868. The committee amendments were accepted *en grosse*. *Ibid.*, p. 2875.

<sup>44</sup> *Ibid.*, pp. 2865, 2866, 2867.

<sup>45</sup> The penalty-clause amendment was rejected by a vote of 214 to 79. *Ibid.*, p. 2866. Representative Davis' argument in support of this amendment, which he proposed, was that it would be illogical for Congress to define a crime and not provide a penalty for punishing the offender; for not to do so would give to the act the character only of a surrender of power to the states. *Ibid.*, p. 2821. Representative Webb contended that to adopt the Davis amendment would involve an employment of the federal authority to execute the criminal statutes of the states, which it was doubtful that Congress could do constitutionally. *Ibid.*, p. 2807. It would seem that this objection was not well founded in view of subsequent validation by the Supreme Court of the Ashurst-Sumners Act of 1935 prohibiting and punishing the introduction of prison-made goods into a state in violation of its laws.

<sup>46</sup> *S. Rept.* 956, 62d Cong., 2d Sess., on S. 4043.

<sup>47</sup> See *supra*, p. 205. According to Senator Kenyon's statement, the author of the additional section was Senator Sanders, of Tennessee, a member of the committee. *Cong. Rec.*, 62d Cong., 3d Sess., p. 761.

<sup>48</sup> As reported from committee the second section of the measure provided: "That all fermented, distilled, or other intoxicating liquors or liquids transported

Section two of the committee proposal was subjected to severe criticism. It was assailed as incompatible and inconsistent with the first section. Critics pointed out that by the proposed second section Congress was undertaking to regulate commerce in liquors by declaring them subject to state authority at a specified point of time in the interstate transaction, yet by the first section it was assuming to impose on that commerce a rule of its own making. They urged that it would be inconsistent for Congress to regulate commerce in a particular subject and at the same time divest itself of control over the very subject matter regulated. The constitutional authority of Congress to "chop off" an essential part of an interstate transaction and submit it to state control was questioned. A concession that Congress might submit the "incidental" right of sale in the original package to state control, they maintained, did not warrant the additional concession that it might go further and submit to state authority the constitutional right to receive such goods.<sup>49</sup>

The force of the argument against the constitutionality of the second section was admitted even by some supporters of the committee recommendations.<sup>50</sup> Such argument as was advanced in support of it was similar to that which had been advanced previously in support of the Littlefield and the Hepburn-Dolliver bills: If Congress could constitutionally submit to state control the right of sale in the original package, it might by the same token move forward even further the point of operation of state power. If it could "chop off" one part of the interstate transaction and

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into any State...or remaining therein for use, consumption, sale or storage therein, shall upon arrival within the boundaries of such State...and before delivery to the consignee, be subject to the operation and effect of the laws of such State...enacted in the exercise of its reserved police powers, to the same extent and in the same manner as though such liquors or liquids had been produced in such State...and shall not be exempt therefrom by reason of being introduced in the original package or otherwise" *Cong. Rec.*, 62d Cong., 3d Sess., p. 2900.

<sup>49</sup> The constitutionality of the second section was questioned on these grounds by Senator Borah, of Idaho, *ibid.*, pp. 702, 2919; Senator Paynter, of Kentucky, *ibid.*, pp. 2688-2689; Senator Pomerene, of Ohio, *ibid.*, p. 2902; Senator Root, of New York, *ibid.*, p. 2914; and Senator Sutherland, of Utah, *ibid.*, pp. 2909-2910.

<sup>50</sup> Doubt concerning the constitutionality of the second section was admitted by Senators Kenyon, of Iowa, and McCumber, of North Dakota, both active supporters of the measure. *Ibid.*, pp. 702, 769, 830. Senator Borah argued for the constitutionality of the first section, but was outspoken in his condemnation of the second section. *Ibid.*, p. 2919

submit it to state control, it could likewise "chop off" another.<sup>51</sup> As the debate proceeded it was tacitly assumed that the second section would be eliminated. This assumption proved to be correct, although for tactical reasons the committee version of the bill was tentatively adopted with this clause included.

After acceptance of the committee amendments, including the additional divesting section, the Senate amended the Kenyon Bill by substitution of the language of the Webb Bill as passed by the House, which had the effect of eliminating the second section.<sup>52</sup> To define more clearly the purpose of the measure Senator Gallinger, of New Hampshire, moved that the title be changed from "a bill prohibiting interstate commerce in intoxicating liquors in certain cases" to "a bill divesting intoxicating liquors of their interstate character in certain cases." This motion was adopted.<sup>53</sup> As the bill passed by the Senate was the Kenyon Bill, modified to make it coincidental in language with the Webb Bill, it was necessary to have subsequent House approval. This was at once given by that body.<sup>54</sup>

After receiving an opinion from Attorney General Wickersham advising him that the measure was unconstitutional,<sup>55</sup> President Taft returned the bill with a veto. The veto message,<sup>56</sup> reviewing in part the arguments in the Attorney General's opinion, based the rejection squarely upon constitutional grounds. The President pointed out that the decisions of the Supreme Court had established beyond any controversy that intoxicating liquors were legitimate articles of commerce; that state interference with the right to receive liquors in interstate commerce had been held to be an invasion of the exclusive power of Congress over such commerce; and that for Congress to permit state action upon shipments of liquors prior to their reception by importers would be a violation of the constitutional arrangement by which the regulation of commerce had been confided exclusively to Congress. The conclusions of the Knox Report were quoted with approval. Congress and the Presi-

<sup>51</sup> See the remarks of Senator Nelson, of Minnesota, *ibid.*, p. 829.

<sup>52</sup> Personal-use exemption amendments offered by Senator O'Gorman, of New York, and Senator Hitchcock, of Nebraska, were defeated, the latter's by a vote of 50 to 31. *Ibid.*, pp. 2921, 2924.

<sup>53</sup> *Ibid.*, p. 2924.

<sup>54</sup> *Ibid.*, p. 3018.

<sup>55</sup> 30 *Ops. Atty. Gen.* 88 (1913).

<sup>56</sup> *Cong. Rec.*, 62d Cong., 3d Sess., pp. 4291-4292.

dent should not attempt to shift the burden of responsibility for preventing a plain violation of the Constitution upon the courts. The President intimated that, if further legislation was deemed necessary, Congress should seek to aid the states by the enactment of positive regulatory legislation along the line of the Criminal Code provisions adopted in 1909, rather than by an enlargement of the scope of state power to deal with interstate shipments.

The reasons advanced in support of the veto, as was later pointed out,<sup>57</sup> were not particularly well chosen. The President's arguments were more pertinent to that part of the Senate bill extending the operation of state laws to interstate shipments at the point of crossing the state boundary than to the provision actually adopted. The clause in the bill based upon the Wilson Act mode of procedure had been stricken out. The remaining section which constituted the act embraced an entirely different method of treatment, although the result would be substantially the same as that produced by the second section. It was open to criticism as an unconstitutional delegation of power, but the line of argument against it ran a somewhat different course from that which the President's arguments followed.

The veto message had little effect, owing to the public pressure upon Congress by the prohibition element for action. After a brief discussion the Senate passed the bill over the presidential veto by a vote of 63 to 21.<sup>58</sup> The House overrode the veto by a vote of 246 to 95.<sup>59</sup>

The text of the act "to divest intoxicating liquors of their interstate character," which thereupon became a part of the law of the land, was as follows:

Be it enacted, etc., That the shipment or transportation in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the juris-

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<sup>57</sup> See the remarks of Representative Webb, *Cong. Rec.*, 62d Cong., 3d Sess., p. 4446. See also the comments in Lindsay Rogers, "The Constitutionality of the Webb-Kenyon Bill," 1 *California Law Rev.* 449, 501 (Sept., 1913).

<sup>58</sup> *Cong. Rec.*, 62d Cong., 3d Sess., p. 4299.

<sup>59</sup> *Ibid.*, p. 4447.



dition thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited <sup>60</sup>

Though the title of the act characterized it as a divestment measure, it was couched in terms of a *prohibition*. This apparent incongruity in the title and the content of the act was not due to oversight. On the contrary, the words of the title were chosen deliberately for the purpose of giving the act meaning. In its original form the Webb Bill had contained a clause denying the validity of contracts made in connection with interstate shipments prohibited by the proposed act, and withdrawing from the federal courts jurisdiction over suits arising from such contracts; similarly the Kenyon Bill, as reported by the Judiciary Committee, contained a provision permitting the operation of state laws upon interstate shipments from the moment of crossing the boundary line of the destination state. These provisions, which could more properly have been described as divestment legislation, had both been eliminated in the course of deliberations in the two Houses, leaving only the prohibitory clause in the measure. Yet the purpose of the act was still to *divest* liquors of protection under the commerce clause, not to impose an actual federal prohibition.

To retain the idea that the intent of Congress was to *subject to state control* the commerce described in the body of the act, the title had been changed late in the proceedings. The original terminology, characterizing it as a "bill prohibiting interstate commerce in intoxicating liquors in certain cases," was supplanted by language describing it as one "divesting intoxicating liquors of their interstate character in certain cases." <sup>61</sup> This change had the effect of conveying the idea that the Congressional intention was to produce a *divestment result* by an *act of prohibition*. To have retained the original title would have made the act meaningless. A positive prohibition of commerce in certain cases would have been set up, but with no sanction to enforce the prohibition. With the changed title, the law could be construed as a divestment of federal protection and a subjection of liquor shipments to state control. It was

<sup>60</sup> 37 Stat. 699

<sup>61</sup> Cong. Rec., 62d Cong., 3d Sess., p. 2924.

a divestment of interstate character as commerce, achieved by an act of prohibition implying a relinquishment of Congressional regard for it as legitimate commerce.<sup>62</sup>

The language of the title of the act, it has been noted, was ill chosen, particularly in view of the fact that reliance had to be placed upon it to give the measure real meaning and force.<sup>63</sup> The title declared the act to be one divesting intoxicating liquors of their "interstate character" in certain cases. Goods possess an "interstate character" by reason of the physical fact of their origin in states other than the state of destination and their subsequent introduction through an interstate transportation and delivery. This fact could not be altered by a legislative declaration to the contrary. What the act really proposed to do was to divest interstate shipments of liquors of their *interstate commercial character*. This purpose would have been more clearly indicated by a title which had reference to deprivation of "character as an article of interstate commerce" or of "interstate commercial character" rather than to deprivation of "interstate character."<sup>64</sup> The ignoring of such phraseological niceties as this, to say nothing of the fact that the title of the act rather than its body had to be relied upon to give it a meaning, did not prevent the courts from interpreting and applying it to accomplish the purpose intended by Congress.

## 2. THE CONSTITUTIONALITY OF THE WEBB-KENYON ACT

THE Webb-Kenyon Act was a unique piece of legislation, founded on an entirely new concept of the power of Congress to regulate commerce. It had no exact counterpart in any previous legislation, and although it achieved the distinction of supplying the model

<sup>62</sup> The suggestion has been made that, if the prohibition of commerce contained in the Webb-Kenyon Act would cause the prohibited commerce to be deprived of the protection of the commerce clause, any prohibition of interstate commerce by Congress should be given like effect. Since Congress had prohibited commerce in lottery tickets, they should be regarded as no less "divested" of the protection of the commerce clause than were intoxicating liquors. See Lindsay Rogers, "The Power of the States over Commodities Excluded by Congress from Interstate Commerce," 21 *Yale Law Jl.* 367, 370-371 (May, 1915). This conclusion would seem to be justified, but there have apparently been no attempts to apply the divestment principle on this basis to goods other than intoxicating liquors.

<sup>63</sup> Noel T. Dowling and F. Morse Hubbard, "Divesting an Article of Its Interstate Character," 5 *Minnesota Law Rev.* 253, 261-263 (March, 1921).

<sup>64</sup> Cf. the discussion of the phraseology of the Barbour Act, *supra*, p. 182.

for the language of a section of the amendment repealing the Eighteenth Amendment of the Constitution, it has had no parallel in legislation applying to any subject other than intoxicating liquors. The reasoning by which its constitutionality was sustained was not very convincing. The embodiment of the Webb-Kenyon Act principle in the Twenty-first Amendment was due, in part at least, to lingering doubts concerning its constitutionality. Doubts which had been strongly expressed at the time of its enactment remained even after the validation of the act by the Supreme Court.

The debate in Congress on the bill developed the following argument in support of its constitutionality:<sup>65</sup> Congress has the power to regulate commerce in intoxicating liquors. This power of Congress, being plenary, may be exerted to the extent of absolute prohibition of such commerce. If Congress can prohibit all commerce in intoxicating liquors, it can prohibit it in part, for the greater power of total prohibition must necessarily include the lesser power of partial prohibition. It was within Congressional competence to adopt the rule that commerce carried on with the intent to violate the police-power enactments of a destination state should be prohibited, for Congress may regulate commerce in such a way as to achieve police-power objectives lying within the scope of state authority.<sup>66</sup> To establish as the measure of prohibition an intent to violate a state law was within Congressional competence, for Congress may, if it chooses to do so, cause its regulations of commerce to conform to and support the policies of the states in the regulation of matters falling within the scope of their reserved powers.<sup>67</sup> To base a prohibition of commerce upon criminal intent was constitutional.<sup>68</sup>

<sup>65</sup> For speeches elaborating the theory upon which the constitutionality of the measure was based see the remarks of Senator McCumber, of North Dakota, *Cong. Rec.*, 62d Cong., 3d Sess., pp. 702-705; Senator Kenyon, of Iowa, *ibid.*, pp. 761-769, 828-830, Senator Borah, of Idaho, *ibid.*, pp. 2919-2920; and Representative Webb, of North Carolina, *ibid.*, pp. 2806-2814. The constitutionality of the bill was also defended in a forty-eight-page brief prepared by Senator Gronna, of North Dakota, printed as *S. Doc.* 1060, 62d Cong., 3d Sess. (No. 6365).

<sup>66</sup> Cf. *Champion v. Ames*, 188 U. S. 321 (1903) (*The Lottery Act Case*); *Hipolite Egg Co. v. United States*, 220 U. S. 45 (1911) (*The Pure Food and Drug Law Case*).

<sup>67</sup> Cf. *Rupert v. United States*, 181 F. 87 (C. C. A., Eighth) (1910) (*The Lacey Act Case*).

<sup>68</sup> In support of this argument were cited statutes relating to the slave trade, which prohibited the outfitting of vessels in American ports for the purpose of engaging in this trade and also the bringing of persons into the United States

The effect of a Congressional declaration prohibiting commerce in intoxicating liquors would be to deprive it of legitimate character, and thus remove the protection of the commerce clause from it and allow state regulations to apply. The Supreme Court had indicated that it was an implied recognition of legitimacy by Congress which placed this commerce beyond the reach of state police authority.<sup>69</sup> The fact that the proposed regulation might result in a nonuniformity of rule under which commerce was to be carried on was of no moment, since the Constitution required only those regulations applying to foreign commerce to be uniform. To base a prohibition upon intent to violate the law of a destination state did not constitute a delegation of the commerce power to the states, since the prohibition in such circumstances would arise from the will of Congress and not from the will of the state.

In justifying the submission of the regulation of commerce in intoxicating liquors to state control in the manner contemplated the suggestion was also made that such action might be considered simply an extension into the state-federal sphere of the "local-option" method of dealing with the subject.<sup>70</sup> However, there was no attempt to show where Congress might derive the power to establish a system of state regulation in this fashion. It was also suggested that the proposal under consideration might be considered an "adoption" by Congress of state regulations on the subject of the liquor traffic which would make them applicable to interstate shipments.<sup>71</sup> Obvious weaknesses in the adoption theory prevented its being strongly urged. While Congress might constitutionally adopt existing state regulations to make them apply to interstate transactions, it could not be regarded as having the power

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with the intent to hold such persons in involuntary servitude. See *Criminal Code of 1909*, secs 249, 255, 271. The White Slave Act of June 25, 1910, 36 Stat. 825, was also noted, but its constitutionality was still in question at the time of the debate on the Webb-Kenyon Bill.

<sup>69</sup> Citing *Bowman v. Chicago and Northwestern Ry Co*, 125 U. S. 465 (1888), and *Leisy and Co. v. Hardin*, 135 U. S. 100 (1890).

<sup>70</sup> See the remarks of Senator Stone, of Missouri, *Cong. Rec.*, 62d Cong., 3d Sess., p. 2917, and of Representative Webb, of North Carolina, *ibid.*, p. 2812.

<sup>71</sup> See the remarks of Representative Mondell, of Wyoming, *ibid.*, p. 2838. The chief supporters of the measure avoided the adoption theory in their defense of it, but cited as precedents earlier legislation in which Congress had "harmonized" its enactments with state statutes, either by adopting them or by conditioning federal regulation upon state action. See the remarks of Representative Webb, of North Carolina, *ibid.*, p. 2811, and of Senator Kenyon, *ibid.*, p. 839; see also *H Rept.* 1461, 62d Cong., 3d Sess., p. 6.

to adopt such regulations prospectively. This would involve a grant of power to the states to make and unmake federal laws. States would have the power to declare whether intoxicating liquors were to be considered legitimate articles of commerce, a power which only Congress might exercise. Moreover, the proposed act was not regarded in any sense as requiring federal administrative action. From the first it was regarded as *enabling* legislation, designed to enlarge the scope of state authority, not as a regulation toward the enforcement of which federal administrative officials would take positive action.

The critics of the measure attacked this supporting theory at numerous points.<sup>72</sup> In the Senate the criticism of that part of the bill proposing to prohibit interstate shipments of liquor when there was an intent to violate state laws was so closely intertwined with the criticism of the section proposing to extend the operation of state laws to such shipments upon crossing the state boundary that the two lines of counterarguments cannot be wholly distinguished. However, a fairly distinct course of reasoning against the principle of divestment by prohibition embodied in the completed measure is discoverable. The criticism ran as follows: Congress possesses the exclusive power of regulating both foreign and interstate commerce when national interests require uniformity of rule in its regulation. Commerce in intoxicating liquors is a subject requiring uniform federal regulation.<sup>73</sup> The power of Congress to regulate interstate commerce, although granted by the same clause which confers upon it authority over foreign commerce, is not coextensive with its power to regulate in the foreign field. Though Congress may regulate foreign commerce to the point of prohibition, in the interstate field its power to regulate by prohibition is much less complete. It can prohibit interstate commerce only in goods which,

<sup>72</sup> The most comprehensive and the best-digested argument against the bill on constitutional grounds was that of Senator Sutherland, of Utah, *ibid.*, pp. 2903-2911. The constitutionality of the bill was also challenged in speeches by Senator Paynter, of Kentucky, *ibid.*, pp. 2688-2690; Senator Pomerene, of Ohio, *ibid.*, pp. 2899-2903; Senator Root, of New York, *ibid.*, pp. 2914-2915; and Representative Brantley, of Georgia, *ibid.*, pp. 2826-2827. See also the opinion of Attorney General Wickersham, 30 *Ops. Attv. Gen.* 88 (1913), advising a presidential veto of the bill. This opinion was largely a restatement of the arguments developed in the discussion in Congress.

<sup>73</sup> Citing *Bowman v. Chicago and Northwestern Ry. Co.*, 125 U. S. 465 (1888); *Leisy and Co. v. Hardin*, 135 U. S. 100 (1890); and *Rhodes v. Iowa*, 170 U. S. 412 (1898).

by reason of their having been generally banned as articles of trade by the states, have lost their legitimate character.<sup>74</sup> Intoxicating liquors were legitimate articles of commerce. By its taxation measures and commercial regulations Congress had so treated them; and the Supreme Court had not only characterized them as legitimate articles of commerce,<sup>75</sup> but had declared that the right to receive them through the channels of interstate commerce was a "constitutional right" which the states might not infringe.<sup>76</sup> So long as they retained this character, which was a status derived from the fact of their general acceptance as articles of trade, Congress might not prohibit interstate commerce in them.<sup>77</sup>

Critics of the bill maintained that, even if Congress were conceded to have power to prohibit interstate commerce in intoxicating liquors, the proposed measure was constitutionally unsound. Though couched in terms of a prohibition, it was not a bona fide prohibitory regulation. There was absent the essential feature of a prohibition a penalty for noncompliance with its terms. It was a legislative anomaly, having as its true purpose and effect the delegation of power to the states to determine the circumstances under which commerce in liquors might be carried on. The procedure contemplated in the bill was constitutionally defective on a variety

<sup>74</sup> The supporters of the bill were willing to concede the point that the proposed method of divestment by prohibition could be extended only to articles generally condemned under state police regulations. Senator McCumber admitted that the principle could be applied only to "a certain class of commodities which are more or less under the ban of public opinion and which a great proportion of the people do not recognize as property whatever." *Cong Rec*, 62d Cong., 3d Sess., p. 703. Senator Kenyon, in answer to a question involving this point, expressed doubt whether Congress possessed the power to apply such a method of regulation to corn or wheat or any other generally accepted article of commerce. *Ibid*, p. 763. Advocates of the Webb-Kenyon Bill refused to concede that intoxicating liquors were not sufficiently under public condemnation to be subject to the prohibitory power of Congress.

<sup>75</sup> *Louisville and Nashville R. R. Co. v Cook Breaving Co.*, 223 U. S. 70 (1912); *American Express Co. v Iowa*, 196 U. S. 133 (1905).

<sup>76</sup> *Vance v. Vandercook Co.*, 170 U. S. 438 (1898).

<sup>77</sup> Senator Sutherland, in advancing the argument against the bill on this point, declared: "It may be conceded that if the time shall ever come when intoxicating liquor is outlawed by substantially the whole people of the United States, as lottery tickets were outlawed, that Congress may forbid its transportation upon the ground that it would in that event no longer be a legitimate article of commerce." But he refused to admit that intoxicating liquors had as yet become subject to the power of Congress to exclude them from commerce. Consequently Congress might not permit the states to exclude them. *Cong Rec.*, 62d Cong., 3d Sess., pp. 2907-2908.

of counts. It would result in the surrender to the states of an exclusive national power to prescribe the rules under which interstate commerce could be carried on, in respect to matters over which the Supreme Court had declared the states to be incompetent to act. It would sanction a nonuniform system of regulation for that commerce, contrary to the spirit and meaning of the commerce clause. It would allow the laws of a destination state to have extra-territorial operation in states wherein shipments might originate or contracts might be made for delivery of shipments. It would permit a destination state to violate a citizen's constitutional right to receive goods through interstate commerce, as well as the rights of individuals in another state to contract for the transportation and sale of goods through interstate commercial channels. It would empower the states to set at nought federal regulations applying to importation and to interstate shipment of liquors. Moreover, the rule that commerce in intoxicating liquors should be banned when the intent of parties connected with the shipment was to violate a law of the state of destination was unreasonable and therefore violative of the constitutional guarantee of due process of law. The liability of shippers or carriers would be made dependent upon the acts of others, whose intent to violate a state regulation could not be a matter of knowledge to them and whose actions could in no way be controlled by other parties involved in the transaction.<sup>78</sup> If the proposal be considered an adoption of state police statutes making them applicable to interstate shipments as federal regulations, it was open to criticism as a delegation of power to the states because the states would be granted authority to formulate rules having the force of federal law.<sup>79</sup> To summarize the argument against the bill advanced by its critics, it was "a proposition to allow the States to do that which it is at least doubtful that Congress can do, to wit, prohibit the interstate shipment of a legitimate article of commerce."<sup>80</sup>

<sup>78</sup> This point was stressed particularly by Senator Root, of New York, *ibid.*, pp. 2914-2915, and Representative Brantley, of Georgia, *ibid.*, p. 2826.

<sup>79</sup> See the remarks of Senator Sutherland, *ibid.*, p. 2907, and of Representative Brantley, *ibid.*, p. 2827.

<sup>80</sup> See the remarks of Senator Paynter, of Kentucky, *ibid.*, pp. 2687-2688. An interesting commentary on the attitude of Congressmen on constitutional issues was furnished by the statements of those members who, although expressing grave doubts regarding the constitutionality of the bill, voted for it because they believed it to have the support of their constituents. They were willing to rely upon the courts to settle finally the constitutional question. An illustration

Favorable action by Congress on the bill had the effect of shifting the discussion of its constitutionality and meaning to the pages of legal journals, and eventually to the courts. Prior to examination of the act by the Supreme Court three views, speaking generally, had been advanced regarding its validity and construction. In the first place, some commentators confidently asserted that, in the light of its earlier declarations on the limits of state power over liquors in interstate commerce, the Supreme Court must necessarily hold the measure void as an attempted delegation of the commerce power to the states.<sup>81</sup> Another view was that the act was a constitutional regulation of commerce by Congress, free from any defect of attempted delegation of power, provided it was construed to enable the states only to take procedural steps in enforcing police-power measures which were valid in the absence of the federal regulation. It could be construed to give the states authority to enact hitherto invalid laws operating upon intoxicating liquors prior to their reception by consignees only if the state adopted the policy of prohibiting possession and use of such liquors for beverage purposes. By banning their possession and use for beverage purposes the state would have placed them outside the protection of its own laws relating to ordinary commerce. The federal law would thus permit these prohibitive state regulations to attach before completion of the interstate transaction by which liquors were introduced into the state.<sup>82</sup> A third viewpoint was that the Webb-

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is afforded by Representative Small, of North Carolina. After giving an excellent statement of the reasons why he considered the proposed measure unconstitutional, he declared he would vote for it because his constituents wanted it. *Ibid.*, p. 2833.

<sup>81</sup> Allen H. Kerr, "The Webb Act," 22 *Yale Law Jl.* 567 (June, 1913) Kerr concludes: "In order to sustain the Webb Act a generation of strong decisions will have to be overruled, the theory of interstate commerce control as the exclusive prerogative of the United States will have to be abandoned, and State laws given an extra-territorial effect co-extensive with the Union . . . a combination of opposing forces with which the Webb Act does not seem robust enough to contend."

<sup>82</sup> See Lindsay Rogers, "The Constitutionality of the Webb-Kenyon Bill," 1 *California Law Rev.* 499 (Sept., 1913). The same view on the question of the construction of the act was advanced by Rogers in "The Power of the States over Commodities Excluded by Congress from Interstate Commerce," 24 *Yale Law Jl.* 567 (May, 1915); "State Legislation under the Webb-Kenyon Act," 28 *Harvard Law Rev.* 225 (Jan., 1915); "Unlawful Possession of Intoxicating Liquor and the Webb-Kenyon Act," 16 *Columbia Law Rev.* 1 (Jan., 1916); and "The Virginia Prohibition Law and the Commerce Clause," 3 *Virginia Law Rev.* 483 (April, 1916).



Kenyon Act was constitutional and that it should be interpreted broadly to allow the states to apply any regulations they deemed proper to adopt in reference to the traffic in intoxicating liquors, so long as there was no discrimination against interstate commerce. The federal statute should be construed as an expression of the legislative will that national commercial considerations should not obstruct the achievement of any reasonable state police-power objectives. In other words, Congress had provided by statute a basis for reversal of the rulings in both the *Leisy* and the *Bowman* cases.<sup>83</sup>

Early court decisions in cases involving state power under the Webb-Kenyon Act upheld its constitutionality in every instance. There was disagreement among them, however, regarding the scope of authority permitted the states by the federal act. A number of states had prohibited all delivery of intoxicating liquors by carriers within local-option dry territory. Other states had laws prohibiting delivery of liquors for sale in dry areas, requiring permits for delivery therein of liquors for personal use, and designating the amount of liquors that might be delivered in one shipment to individuals for personal use or limiting the total amount which might be delivered to one individual over a specified period of time. Some courts construed the act broadly to give effect to state regulations of this character in respect to interstate shipments. An intent to violate *any* state regulation relating to the transportation and delivery of liquors was held to be covered by it.<sup>84</sup> Other courts, though considering the Webb-Kenyon Act to be a valid regulation of commerce by Congress, construed it more narrowly. They refused to allow states to interfere with the transportation and delivery of liquor in interstate commerce where there was no local regulation prohibiting possession or use thereof.<sup>85</sup>

<sup>83</sup> See Winfred T. Denison, "States' Rights and the Webb-Kenyon Liquor Law," 14 *Columbia Law Rev.* 321 (April, 1914).

<sup>84</sup> *United States v. Oregon-Washington Railroad, etc.*, 210 F. 378 (D. C., D. Ore.) (1913); *State v. Grier*, 27 Del. 322 (4 Boyce), 88 Atl. 579 (Gen. Sess.) (1913); *State v. Van Winkle*, 27 Del. 405 (4 Boyce), 88 Atl. 807 (Gen. Sess.) (1913); *Atkinson v. Southern Express Co.*, 91 S. C. 444, 78 S. E. 516 (1913); *Kansas v. Columbia Brewing Co.*, 92 Kans. 212, 139 Pac. 1139 (1914); *State v. United Express Co.*, 164 Iowa 112, 145 N. W. 451 (1914); *West Virginia v. Adams Express Co.*, 219 F. 794 (C. C. A., Fourth) (1915); *American Express Co. v. Beer*, 107 Miss. 528, 65 So. 575 (1914); *Southern Express Co. v. State*, 188 Ala. 454, 66 So. 115 (1914); *Southern Express Co. v. Whittle*, 194 Ala. 406, 69 So. 652 (1915); *Glenn v. Southern Express Co.*, 170 N. C. 286, 87 S. E. 136 (1915).

<sup>85</sup> *Adams Express Co. v. Commonwealth*, 154 Ky. 462, 157 S. W. 908 (1913);

In the first case involving the Webb-Kenyon Act to be brought before the Supreme Court for review the question was presented whether a state law prohibiting transportation of liquors into a local-option dry area in the state of Kentucky was applicable to interstate shipments in the absence of local legislation prohibiting possession or use of liquors. The sale of liquors for beverage purposes was prohibited by state law in local-option areas. An express company was indicted under the state law for making an interstate delivery in such an area. Conviction was obtained in the trial court, which placed reliance upon the Webb-Kenyon Act to sustain the conviction. The United States Supreme Court, assuming the constitutionality of the Webb-Kenyon Act, refused to hold it applicable so as to allow state interference with the transportation of liquors in interstate commerce in these circumstances.<sup>86</sup> Following the construction of the state statute given by the Kentucky Court of Appeals in a similar case,<sup>87</sup> which held that the state law under consideration did not prohibit transportation of liquors into such dry areas for personal use or their possession for that purpose, the Court considered the state law to be inoperative upon the action in question. The ruling of the trial court was therefore reversed.

The Supreme Court thus avoided meeting directly the issue of the constitutionality of the Webb-Kenyon Act. The construction given it conveyed the impression that there must be an intent to violate otherwise valid local regulations prohibiting sale, possession, or use of intoxicating liquors before state regulations could be held applicable to interstate shipments under it.<sup>88</sup> As has been seen,

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*Palmer v. Southern Express Co.*, 129 Tenn. 116, 165 S. W. 236 (1913), *West Indiana v. Adams Express Co.*, 219 F. 331 (D. C., S. D. W. Va.) (1914), reversed, 219 F. 794 (see *supra*, note 84); *Van Winkle v. Delaware*, 27 Del. 578, 91 Atl. 385 (1914), reversing *State v. Van Winkle*, 27 Del. 405, 88 Atl. 807 (1913) (see *supra*, note 84). See also *Chicago, Burlington and Quincy Railroad Co. v. Giles*, 235 F. 804 (D. C., Colo.) (1916).

<sup>86</sup> *Adams Express Co. v. Kentucky*, 238 U. S. 190 (1915).

<sup>87</sup> *Adams Express Co. v. Commonwealth*, 154 Ky. 162, 157 S. W. 908 (1913). The case taken to the Supreme Court was one of nineteen brought against the express company for violation of the Kentucky transportation statute. A conviction was obtained in this case, but since the fine imposed was only fifty dollars, the state Court of Appeals did not have jurisdiction over it. Hence it was appealed directly to the Supreme Court. The state statute involved in these cases was the same one held by the Supreme Court to be inapplicable to interstate shipments in *Louisville and Nashville R. R. Co. v. Cook Brewing Co.*, 223 U. S. 70 (1912); see *supra*, pp. 109, 202.

<sup>88</sup> Justice Day, delivering the opinion of the Court, said on this point: "It

this was a narrower construction of the act than had been accorded it by many lower courts. If followed to its conclusion, this construction would compel the states to adopt rigidly restrictive legislation governing sale, possession, and use of intoxicating liquors to cause the Webb-Kenyon Act to be effective in augmenting state power over interstate transportation and delivery of liquor shipments. Such a construction would place the act upon a stronger constitutional basis, however, since it would not allow the states to deal with interstate shipments of liquors unless this traffic was wholly prohibited and liquors ceased to have standing as a legitimate article of possession, use, or trade under local laws.

In the second case to come before it the Supreme Court failed to adhere to this narrow interpretation of the act. The circumstances of the case were rather involved. On July 1, 1914, there became effective a West Virginia prohibition law by the terms of which the manufacture, sale, keeping, or storing for sale of intoxicating liquors in the state was prohibited. The state act provided that a delivery of liquors by common carrier in the state was to be considered a consummation of sale, and prohibited all solicitation of sale by advertising, circulars, price lists, etc. It did not prohibit in express terms possession of liquors for personal use or their use. To insure compliance with the law, enforcement officers of the state had secured injunctions directed toward the Western Maryland Railroad and the Adams Express Company. The companies were instructed not to deliver liquors in the state without previously exercising due diligence in ascertaining that the consignees intended to use them legitimately.

After the issuance of these injunctions suits were brought in a federal district court by the Clark Distilling Company, a Maryland firm engaged in shipping liquor into the state, to compel these companies to accept shipments of liquors in Maryland for delivery in West Virginia. The companies set up as their defense

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would be difficult to frame language more plainly indicating the purpose of Congress not to prohibit all interstate shipment or transportation of intoxicating liquors into so-called dry territory and to render the prohibition of the statute operative only where the liquor is to be dealt with in violation of the local law of the State into which it is thus shipped or transported. *Such shipments are prohibited only when such person interested intends that they shall be possessed, sold, or used in violation of any law of the State wherein they are received.* Thus far and no farther has Congress seen fit to extend the prohibitions of the act in relation to interstate shipments." *Adams Express Co. v. Kentucky*, 238 U. S. 190, 199 (1915). (Italics mine.)

the court injunctions, together with evidence to show that the distilling company had been engaged in undertakings which were violative of the West Virginia statute. The district court, holding that the state statute did not prohibit introduction of liquors for personal use and relying upon the authority of the Supreme Court's ruling in *Adams Express Company v. Kentucky*, prepared to issue a decree to satisfy the complainant. Before the decree became final the United States circuit court of appeals for that area made a ruling in another case holding the state law to be applicable under the Webb-Kenyon Act in prohibiting interstate delivery and solicitation of sale of liquors for personal use.<sup>89</sup> Following this ruling the district court recalled its original decree, permitted a reargument of the case, and, in compliance with the higher court's construction of the state statute, dismissed the suit of the distilling company.<sup>90</sup>

The case was then carried to the Supreme Court. Before a ruling was made upon it the West Virginia law was amended to eliminate all question whether the delivery of shipments by carrier for personal use was prohibited. The revised statute, which applied specifically to interstate as well as to intrastate shipments, made unlawful the keeping of liquor, for personal use or otherwise, except in specified instances; prohibited its delivery by common carrier for personal use or otherwise, with exceptions; and prohibited the reception of liquors for personal use from a common carrier or the possession of liquors so received. The result was to make clear beyond all doubt that the delivery of liquors by carriers was prohibited, although there was no general prohibition of possession or use.

The Supreme Court held the state statute applicable to interstate shipments under the Webb-Kenyon Act, and dismissed the suit of the complainant.<sup>91</sup> In giving the opinion of the Court Chief Justice White dealt with four questions: (1) the construction of the West Virginia law relative to prohibition of receipt of liquors from an interstate carrier, for personal use; (2) the validity of the

<sup>89</sup> *West Virginia v. Adams Express Co.*, 219 F. 791 (C. C. A., Fourth) (1915).

<sup>90</sup> *Clark Distilling Co. v. Western Maryland Ry. Co.*, 219 F. 333, 339 (D. C., S. D. W. Va.) (1915).

<sup>91</sup> *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U. S. 311 (1917). The suit involving the express company turned on the issues in the case noted. Holmes and Van Devanter, JJ., dissented, but without offering an opinion, and Justice McReynolds concurred only in the result.

state statute under the commerce clause and the guarantee of due process in the Fourteenth Amendment; (3) the applicability of the Webb-Kenyon Act to the circumstances of the case; and (4) the constitutionality of the Webb-Kenyon Act. The Court had little difficulty in finding that the state statute covered importations of liquor for personal use, all question on that point having been settled by the recent revision.<sup>92</sup> The state law was not violative of the guarantee of due process, but it did impose a direct burden upon interstate commerce. It could be given effect in relation to interstate shipments only if Congress by the Webb-Kenyon Act had "so regulated interstate commerce as to give the State the power to do what it did in enacting the prohibition law and cause its provisions to be applicable to shipments in interstate commerce, thus saving that law from repugnancy to the Constitution of the United States."<sup>93</sup>

The federal act was held to have this effect. The Court pointed out that Congress must have intended by the Webb-Kenyon Act to permit the states to regulate the introduction of liquors for personal use without at the same time requiring that they prohibit all possession and use of liquors in order to do so. To construe the federal act otherwise would be contrary to its "embodied spirit."<sup>94</sup> The ruling in the earlier case of *Adams Express Co. v. Kentucky* was distinguished by pointing out that the state law involved there had been held by the highest court of the state not to prohibit the introduction of liquors for personal use; hence the Webb-Kenyon Act had been held inapplicable.<sup>95</sup> Rulings of state courts holding that the Webb-Kenyon Act permitted state laws to operate upon interstate shipments only when the liquors involved were intended to be used in violation of previously valid state enactments were founded on an "entire misconception" of the act, according to the Court. The Webb-Kenyon Act "did not simply forbid the introduction of liquor into a state for a prohibited use, but took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law."<sup>96</sup> In other words, the federal statute swept away the "constitutional"

<sup>92</sup> *Ibid.*, pp. 318-320.

<sup>93</sup> *Ibid.*, pp. 320-321. It should be noted that the Court failed to employ language describing this "divestment" act as a denial of *Congressional silence* which operated to bar state action, and characterized it as a removal of a *constitutional* disability upon the state

<sup>94</sup> *Ibid.*, pp. 322-323.

<sup>95</sup> *Ibid.*, p. 324

<sup>96</sup> *Ibid.*, p. 325.

right of importation, which had been set up as a barrier to state action in the *Vandercook* case. It also eliminated any question of the invalidity of state laws regulating the transportation and delivery of intoxicants by reason of their extraterritorial operation. In brief, the Webb-Kenyon Act was held to allow the states to *regulate commerce* in liquors, not merely to lay hold of an "out-lawed" commodity prior to its delivery to a consignee.

On the fourth question, touching the constitutionality of the Webb-Kenyon Act, Chief Justice White proceeded first to set up the proposition that Congress has power to prohibit absolutely interstate commerce in intoxicating liquors. That it possessed this power was not to be disputed "in the slightest degree."<sup>97</sup> Any dispute concerning the constitutionality of the federal law turned, therefore, on the particular *method* of prohibition involved. The prohibition of that part of commerce in intoxicating liquors which was to consummate a violation of the laws of the state of destination the Court found to be acceptable under the Constitution on the basis of both "reason" and "authority." The Court "reasoned" that Congress, since it concededly possesses the power to prohibit *all* commerce in intoxicating liquors, might prohibit such commerce only partly or conditionally. Prohibition of only that part of commerce carried on with the intent to violate a state law was within Congressional competence. It was not invalid either as a delegation of power to the states or as establishing a nonuniform regulation of commerce. The Court stated that the argument against the act as a delegation of power to the states rested upon a "mere misconception"; for even though it permitted state prohibitions to apply to the movement of liquors in interstate commerce, "the will which causes the prohibitions to be applicable is that of Congress, since the application of state prohibitions would cease the instant the act of Congress ceased to apply."<sup>98</sup> The requirement of uniformity was satisfactorily met by the federal law. It applied uniformly to the "conditions which call its provisions into play—that its provisions apply to all the States." Therefore objection on that ground was really "a complaint as to the want of uniform existence of things to which the act applies and not to an absence of uniformity in the act itself."<sup>99</sup> But the Court was apparently not wholly satisfied with this "reasoning" concerning the uniformity

<sup>97</sup> *Ibid*

<sup>98</sup> *Ibid*, p. 326.

<sup>99</sup> *Ibid.*, p. 327.

contention. It went on to question whether uniformity of interstate commercial regulation by Congress was required by the Constitution.<sup>100</sup>

Having succeeded to its own satisfaction in establishing the constitutionality of the act on the basis of "reason," the Court turned to a consideration of the constitutional merits of the Webb-Kenyon law from the standpoint of "authority." Noting that there were two classes of subjects of the commerce power recognized in previous opinions of the Court, viz., those upon which states might exercise a subordinate concurrent power in their own right and those over which the power of Congress was exclusive, the Court adverted to the declaration in *Leisy v. Hardin* that as regards matters falling within the second class Congress might subject them to state authority. The protection against the exercise of state authority which they enjoyed "arose only from the absence of congressional regulation"; it endured "only until Congress had otherwise provided."<sup>101</sup> The inclusion of a subject matter within the exclusive-power range did not, therefore, constitute an insuperable obstacle to the exercise of state control over it if Congress willed otherwise.

The Court professed to see a close parallel between the Wilson Act and the statute under consideration, not merely in purpose, but in the power under which they were enacted. The one was "but a larger degree of exertion of the identical power which was brought into play in the other."<sup>102</sup> Clinching the argument in support of the constitutionality of the method of regulation employed in the Webb-Kenyon Act, the Court declared:

[The fundamental error upon which the contention of unconstitutionality rests] is this: The mistaken assumption that the accidental

<sup>100</sup> The Court declared that the uniformity argument "seeks to engraft upon the Constitution a restriction not found in it, that is, that the power to regulate conferred upon Congress obtains subject to the requirement that regulations enacted shall be uniform throughout the United States." *Ibid.* It should be observed that the Court itself had "engrafted" this rule in the Constitution, and had made it an important factor in the argument supporting the theory of the exclusiveness of Congressional power to regulate commerce. See the discussion of the evolution of the exclusive-power and local-concurrent-powers theories of the commerce clause *supra*, pp. 33, 41. Moreover, the uniformity argument had been used by the Court repeatedly in justifying overthrow of state liquor legislation, beginning with *Bowman v. Chicago and Northwestern Ry. Co.*, 125 U. S. 465 (1888).

<sup>101</sup> *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U. S. 311, 328 (1917).

<sup>102</sup> *Ibid.*, p. 330.

considerations which cause a subject on the one hand to come under state control in the absence of congressional regulation, and other subjects on the contrary to be free from state control until Congress has acted, are the essential criteria by which to test the question of the power of Congress to regulate and the mode in which the exertion of that power may be manifested. The two things are widely different, since the right to regulate and its scope and the mode of exertion must depend upon the power possessed by Congress over the subject regulated. Following the unerring path pointed out by that great principle we can see no reason for saying that although Congress in view of the nature and character of intoxicants had a power to forbid their movement in interstate commerce, it had not the authority to so deal with the subject as to establish a regulation (which is what was done by the Webb-Kenyon Law) making it impossible for one State to violate the prohibition laws of another through the channels of interstate commerce. Indeed . . . if we accepted the proposition urged, we would be obliged to announce the contradiction in terms that because Congress had exerted a regulation lesser in power than it was authorized to exert, therefore its action was void for excess of power. Or . . . that because Congress in adopting a regulation had considered the nature and character of our dual system of government, State and Nation, and instead of absolutely prohibiting, had so conformed its regulation as to produce cooperation between the local and national forces of government to the end of preserving the rights of all, it had thereby transcended the complete and perfect power of regulation conferred by the Constitution.<sup>103</sup>

This is strong language, even though it exhibits at the same time the characteristic abstruseness of Chief Justice White's style. It sets up the proposition, in general terms, that a choice of regulatory methods is available to Congress in respect to subject matters falling under exclusive federal jurisdiction. Congress might adopt regulations independently of state policy; or it might cause its regulations to conform to state policy, that is, Congress might regulate by causing the subjects regulated to be governed by state laws. The acceptance of such a doctrine by the Court could only mean a revolutionary departure from the earlier theory of the exclusiveness of the power of Congress over commerce. The exclusive power of Congress would become only a conditional restraint upon the states. The "complete and perfect power of regulation" would necessarily include the power to regulate any matter within the range of federal jurisdiction by a prohibition causing it to fall under state control. The feasibility of maintaining an exclusively national system of regulations over a given subject would, therefore, be conceded to be in the final analysis a legislative question.

In the concluding paragraph of the opinion Chief Justice White,

<sup>103</sup> *Ibid.*, pp. 330-331.



apparently taking note of the broad import of this language, sought to restrict the concession of authority to Congress. Because the method of regulation under consideration was valid with respect to intoxicating liquors it did not follow that Congress might employ indiscriminately within the whole range of the exclusive federal power the regulative formula involved. The "exceptional nature of the subject regulated" was the basis upon which the "exceptional power" exerted in the Webb-Kenyon Act must rest. The acknowledged "enlarged right" of governments to deal with the subject of intoxicating liquors, as shown by "numberless" cases, justified a method of treatment so novel.<sup>104</sup> The implication was that the method of divestment by prohibition could be employed only in respect to matters generally subject to state police-power restrictions.<sup>105</sup> Using this elastic standard, the Court could guard against any untoward manifestation on the part of Congress to subject the nation's commerce to vexatious state interferences.

Though the result of the ruling in the *Clark Distilling Company* case was a desirable one, it is difficult to accept the reasoning of the Court without an acknowledgment that Congress possesses power to overrule the Court on the question of the limits to be ascribed state authority in relation to interstate commerce.<sup>106</sup> Instead of a straightforward repudiation of its previous stand holding intoxicating liquors not to be subject to state police-power regulations where interstate shipments were concerned, the Court chose to

<sup>104</sup> *Ibid*, p. 332.

<sup>105</sup> It has been suggested that what the Court meant was either that Congress could not permit state regulation where diversity of regulation would be so unreasonable as to constitute a violation of due process of law or that Congress could not permit state regulation of commerce in goods innocuous in themselves. See Thomas Reed Powell, "Validity of State Legislation under the Webb-Kenyon Law," 2 *Southern Law Quart.* 113, 117 (April, 1917). Subsequent validation of the Hawes-Cooper Act in the case of *Whitfield v. Ohio*, 297 U. S. 431 (1936), and of the Ashurst-Sumners Act in *Kentucky Whip and Collar Co. v. Illinois Central R. R. Co.*, 299 U. S. 334 (1937), would seem to have settled the point that the Court could not have meant the latter, since the goods involved there were innocuous in themselves.

<sup>106</sup> Contemporary comment upon the Webb-Kenyon decision, though expressing approval of the result reached, was generally critical of the reasoning advanced by the Court. See Samuel P. Orth, "The Webb-Kenyon Law Decision," 2 *Cornell Law Quart.* 283 (May, 1917); Dowling and Hubbard, *op. cit.*, pp. 280-281; Lindsay Rogers, "The Webb-Kenyon Decision," 4 *Virginia Law Rev.* 558, 570 (April, 1917). For another comment which approved the result, but which was less critical of the reasoning of the Court, see Powell, *op. cit.*

achieve the same result through a process of circuitous reasoning which placed the basis of its finding in the Webb-Kenyon Act. A simple reversal of the holdings in *Bowman v. Chicago and Northwestern Railway Company* and *Rhodes v. Iowa* on the question of the limits of state police-power authority would not have done violence to the long-accepted theory of state and federal powers under the commerce clause. Reliance upon the federal act for the changed result placed the Court in the position of practically conceding to Congress a right to consent to state regulation of interstate and foreign commerce in matters held by the Court to fall within the range of exclusive federal power. The position assumed by the Court involved a departure from the fundamental principles by which it had professed to be guided in previous utterances on state and federal regulation of interstate and foreign commerce. The extent of the regulative authority of the states was made to depend upon the will of Congress.

The Court's opinion failed to explain away its declarations in *Vance v. Vandercook Company* concerning the "constitutional" right to import liquors for personal use.<sup>107</sup> The declaration in *Rhodes v. Iowa* to the effect that a state was powerless to regulate the introduction of liquors in interstate commerce because a contract for the transportation of goods in interstate commerce "imported in its very essence a relation which necessarily must be governed by laws apart from the laws of the several states"<sup>108</sup> was also left unexplained. If a state lacked power to interfere in these matters before because of inherent inability to give extraterritorial effect to its regulations, from what source did it acquire power to do so, if not by virtue of a grant of authority from Congress? A Congressional declaration could not change physical facts so that the state law would not have this extraterritorial operation.

The Court's answer apparently was that the liquors to which the Webb-Kenyon Act applied ceased to be legitimate articles of interstate commerce; hence the state laws were not restrained by the commercial character of the subjects dealt with. Still the Court was not clear on how this result was produced. The federal act could be given no meaning in the absence of state legislation supplementing it. If there were no state laws applying to interstate commerce in intoxicating liquors, the federal statute would

<sup>107</sup> 170 U. S. 438, 452, 455 (1898).

<sup>108</sup> 170 U. S. 412, 419 (1898).

be a meaningless abstraction. If there were no federal statute, state laws would be inapplicable to interstate transactions. But such state laws could clothe the federal statute with meaning, while that statute in turn breathed the life of constitutionality into them. By a combination of two elements both equal to zero a positive result was achieved. It was not without good reason that the Chief Justice considered the issues involved in the case in the order chosen. The line of questioning followed by the Court was: Does the state act in question impose a direct burden upon interstate commerce? Answer: Yes. Does it fail of constitutionality unless saved by the federal act? Answer: Yes. Is it saved by the federal act? Answer: Yes. Is the federal act constitutional? Answer: Yes. It would have been interesting to see the result if the Court had proceeded to answer the last question first.

The syllogistic reasoning supporting the constitutionality of the federal statute involved a *non sequitur* of a most elementary sort. Granting that a power in Congress to prohibit *all* commerce in intoxicating liquors necessarily involves a concession of power to prohibit a *part* of that commerce, it does not follow that the same major premise necessitates the concession that Congress can permit the *states* to prohibit a part of that commerce. The greater power of total prohibition presumes the lesser power of partial prohibition *by Congress*. It does not presume a power in Congress to make state laws the measure of its prohibition. The same reasoning employed by the Court in this instance would justify the submission of any federal legislative function to the states, if Congress by a general declaratory act similar to the Webb-Kenyon Act provided that the resulting state statutes were to be considered an expression of its own "will." The Court admitted that the state laws could not apply, except by virtue of the federal act, but it insisted that the prohibition which resulted from the enforcement of state laws was one arising from Congressional "will."<sup>109</sup> How might Congress, without acting subsequently, "will" a change arising by reason of a modification of state laws applying to the

<sup>109</sup> *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U. S. 311, 326 (1917). The Court stated: "It is true the regulation which the Webb-Kenyon Act contains permits state prohibitions to apply to movements of liquor from one State to another, but the will which causes the prohibitions to be applicable is that of Congress, since the application of State prohibitions would cease the instant the act of Congress ceased to apply."

interstate shipment of liquors? If the federal act had been treated as an adoption by Congress of a regulative system prohibiting shipments in violation of the laws of the states *in force at the time of the passage of the statute*, so that change in this system through amendment of the state statutes involved was impossible without Congressional approval, no objection could be raised on this score. The system of regulation would have been one deriving its force wholly from Congress, not from the states. But the federal act admittedly had a prospective operation. Its actual effect would change as state laws changed; state regulations under it would be enforced solely as state regulations, not as federal regulations. It was casuistry in the most elemental form to assume that the state regulations of commerce resulting from the act would derive their force from Congressional will and approval. The Webb-Kenyon Act was a surrender by Congress of a power to regulate commerce, not simply an adjustment of federal regulations to the varying statutes of the states.

The Court's pronouncements respecting the uniformity contention involved "reasoning" of the same questionable sort. In the *Rahrer* case this point had been raised, and the Court had disposed of it satisfactorily enough by holding that the Wilson Act was uniform in operation in that the federal law applied everywhere in the same way to the disposition of liquors in the original package. A uniform rule was set up providing that this incidental part of an interstate transaction should not be protected by the federal commerce power.<sup>110</sup> The Court's answer to this contention in the instant case was that the federal statute met the test of uniformity because it "uniformly applies to the conditions which call its provisions into play—that its provisions apply to all the States,—so that the question really is a complaint as to the want of uniform existence of things to which the act applies and not to an absence of uniformity in the act itself."<sup>111</sup> In other words, the Webb-Kenyon Act operated uniformly, not because it would place interstate shipments of liquors throughout the country under a single uniform rule, but because it would apply uniformly to give the states equal powers over the subject. Their regulations might not be uniform, but that was apparently of no moment.

<sup>110</sup> *In re Rahrer*, 140 U. S. 545, 561, 562 (1890), see *supra*, p. 97.

<sup>111</sup> *Clark Distilling Co. v. Western Maryland Ry Co.*, 242 U. S. 311, 327 (1917).

The Wilson Act had met the uniformity requirement because it dealt with the *subject of regulation*, i.e. liquor shipments in the original package, by a single uniform rule; the Webb-Kenyon Act had done so because it dealt uniformly with the subject of *state regulations* relating to the liquor traffic. The Court might have stated its point more simply, although less convincingly, by declaring that the federal act met the uniformity requirement by providing a uniformly nonuniform system of regulation for the interstate liquor traffic.

The Court maintained the act under consideration to be "identical" with the Wilson Act so far as the authority upon which it was based was concerned. As has been seen, it had regarded the Wilson Act as a definition of the *point of time* in an interstate transaction when intoxicating liquors should be deemed to have become incorporated into the mass of goods subject to state jurisdiction. That law did not deny the "interstate character" of such shipments or the legitimacy of liquors as a subject of commerce. The Webb-Kenyon Act, however, was an exercise of the power of divestment in a different manner and degree, "identical" with the Wilson Act only in the common result of enlarging the scope of state power. It declared intoxicants not to be *subjects of commerce* in certain cases. There was no attempt to specify *at what point* an interstate shipment of liquors should be deemed completed and deprived of the protection of the commerce clause. The Webb-Kenyon Act moved upon the theory that Congress could determine what was a legitimate subject of interstate commerce and, consequently, what should constitute an *interstate commercial transaction*. The power to determine when an interstate transaction shall be deemed *to have terminated* does not necessarily presume the power to declare *what should not constitute an interstate commercial transaction*. It could, of course, be assumed that the power to move forward the point of termination of an interstate transaction implies the existence of power to move forward this point to the extinction of the interstate transaction altogether. But this is a *reductio ad absurdum*, for it would permit Congress to "regulate" commerce by a denial of the existence of the fact which is the basis of the exercise of power by Congress in the first instance.

The *Clark Distilling Company* ruling, therefore, far from being supported on the theory advanced by the Court to sustain the Wilson Act, was in reality the vehicle for the statement of an entirely new theory of Congressional power over commerce, viz.,

that Congress may divest an interstate commercial transaction of the protection against state regulation afforded by the commerce clause, not in its incidental parts merely, but in its fundamental parts as well. This ruling was the culmination of a development in the theory of the commerce power and the original-package doctrine which began first with the dissociation by the Court of a protective federal jurisdiction from the fact of loss of character as an import arising from the mingling of such goods with the local mass of property by acts of the importer. The two concepts had been treated in *Brown v. Maryland* as inseparable and interdependent. Later, in cases involving the state taxing power, a protection against state discrimination arising from the fact of federal jurisdiction had been recognized to be independent of the physical fact of incorporation into the general mass by reason of sale or other act or intention of the importer. Furthermore, federal jurisdiction had been held not to be a bar to the application of state tax measures of a nondiscriminatory character, even prior to the actual incorporation and consequent loss of character as an import.<sup>112</sup> An article of commerce could be subject to the taxing power of a state while still within the range of federal power.

The Wilson Act cases carried further this divergence between the physical facts determining incorporation into the mass, with consequent loss of character as an import, and the inhibition upon state power arising from the existence of federal jurisdiction. The Court therein held that consummation of sale in the original package might be brought within the range of the state police power by federal legislative act. Finally, in the *Clark Distilling Company* case the Court recognized the authority of Congress to disjoin completely the protection against state regulative measures which is implied from an exclusive federal power over commerce, and the physical facts which give a commercial transaction an interstate character. Congress, by legislative pronouncement, might give substance to the legal fiction that an interstate commercial transaction is not "interstate" in character.<sup>113</sup> Even more obviously than in the cases arising under earlier divestment legislation, the Court here acknowledged Congress to be the ultimate authority in determining the limits of state power over subjects within the range of federal control by reason of the commerce clause.<sup>114</sup>

<sup>112</sup> See *supra*, pp. 53-59

<sup>113</sup> Cf. Dowling and Hubbard, *op. cit.*, p. 277

<sup>114</sup> The inquiry naturally presents itself whether the Court would give heed to

## 3. JUDICIAL ELABORATION OF THE WEBB-KENYON ACT

LATER adjudications of cases involving the Webb-Kenyon Act continued to give it an interpretation favoring the extension of state power. In the same term in which the *Clark Distilling Company* case was decided the Supreme Court held that it was within the competence of a state to prohibit possession of intoxicating liquors for personal use.<sup>115</sup> It thus settled a question involving the guarantees of individual rights under the Fourteenth Amendment upon which lower courts had been divided. This decision cleared the way for the enforcement of more stringent state legislation aimed at the liquor traffic. Taken in connection with the Webb-Kenyon decision, the ruling enabled a state to shut off completely all possible sources of supply, local or interstate. As in the case of the Wilson Act, the Webb-Kenyon Act was held by lower courts to permit the application of state regulations to interstate shipments without a reenactment of those laws to cause them to apply in specific language to interstate commerce.<sup>116</sup>

In view of the peculiar character of the Webb-Kenyon Act and the theory upon which it was sustained certain questions of con-

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a Congressional declaration to the opposite effect. In other words, may Congress constitutionally declare that acts within the intrastate commercial sphere in fact are within the federal regulatory authority under the commerce clause because of their intimate relation to interstate and foreign commerce? Numerous cases decided in recent years can be cited to show that the Court will give heed to an expression of view by Congress that matters lying within the intrastate sphere may be made amenable to federal power under the commerce clause. In *United States v. Darby Lumber Co.*, 312 U. S. 100, 118 (1941) (*The Fair Labor Standards Act Case*), Justice Stone declared: "The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce."

On the other hand, the Court has refused to allow a Congressional declaration to be controlling upon subjection to federal regulation of matters anterior to the beginning of an interstate transaction. *Carter v. Carter Coal Co.*, 298 U. S. 238 (1936). It has likewise refused to permit a Congressional declaration to be controlling upon the extension of federal regulation to sales at retail subsequent to the termination of an interstate transaction. *Schechter v. United States*, 295 U. S. 495 (1935).

<sup>115</sup> *Crane v. Campbell*, 245 U. S. 304 (1917). See also *Barbour v. State*, 249 U. S. 454 (1919).

<sup>116</sup> *Hamm Brewing Co. v. Chicago, Rock Island and Pacific Ry. Co.*, 243 F. 143 (C. C. A., Seventh) (1917); *Stajcar v. Dickinson*, 185 Iowa 49, 169 N. W. 756 (1918); *State v. United Express Co.*, 164 Iowa 112, 145 N. W. 451 (1914).

struction gave the courts considerable difficulty. These questions concerned: (1) the extent to which federal regulations of commerce in liquors in effect at the time of the passage of the Webb-Kenyon Act remained in force; (2) the extent to which subsequent federal regulations had the effect of superseding the provisions of the Webb-Kenyon Act; (3) the extent to which interstate shipments continued to be protected by the commerce clause against discriminatory legislation by the state of destination; and (4) the degree to which states, not those of ultimate destination, might interfere with shipments in transit to a destination state when the liquors involved were intended to be introduced in violation of the laws of the destination state.

Attention has already been directed to the enactment of the Criminal Code provisions of 1909, requiring the labeling of packages of liquors to disclose their contents, origin, and destination, and prohibiting C.O.D. deliveries to any persons except bona fide consignees.<sup>117</sup> The labeling requirements of the 1909 law continued to be regarded as effective after the enactment of the Webb-Kenyon Act;<sup>118</sup> likewise the provisions respecting C.O.D. shipments,<sup>119</sup> even with regard to liquors shipped into a state with the intent to violate its laws. In a federal district court case in 1916 the question was presented whether, in view of the federal labeling requirement and the Webb-Kenyon Act, a Colorado statute imposing additional requirements regarding the marking of packages delivered by carriers in the state might be enforced. The district court found the state regulation invalid upon two grounds: (1) because it dealt with a subject matter beyond state jurisdiction, since original packages were within the exclusive jurisdiction of the federal government prior to delivery to the consignee; and (2) because the state regulation conflicted with the labeling requirements set forth in the 1909 law.<sup>120</sup> Later, however, after the validation of the

<sup>117</sup> Act of March 4, 1909, c. 321, secs. 238-240, 35 *Stat* 1136, *supra*, p. 208, note 31.

<sup>118</sup> *United States v. Hillsdale Distilling Co.*, 242 F. 536 (D. C., N. Dak.) (1917); *Schmidt Brewing Co. v. United States*, 254 F. 695 (C. C. A., Eighth) (1918).

<sup>119</sup> *Witte v. Shelton*, 240 F. 265 (C. C. A., Eighth) (1917), certiorari denied, 244 U. S. 660 (1917); *Danciger v. Cooley*, 248 U. S. 319 (1918).

<sup>120</sup> *Chicago, Burlington and Quincy Railroad Co. v. Giles*, 235 F. 804 (D. C., Colo.) (1916). The Court, holding the Webb-Kenyon Act inapplicable, did not examine the constitutionality of that act, but observed that it "might be hard to find the power from which it emanated." *Ibid.*, p. 806. The first point made



Webb-Kenyon law by the Supreme Court, the Supreme Court of Washington found a state statute requiring that permits issued by state authorities be attached to liquor shipments for delivery in the state applicable to interstate shipments under the terms of the Webb-Kenyon Act.<sup>121</sup> This result was not changed when the question of conflict with the federal labeling statute was raised.<sup>122</sup> This view of the validity of the state statute in the light of the commerce clause and the 1909 federal law received confirmation by a United States Supreme Court ruling on a Washington case of later date.<sup>123</sup>

A similar conclusion resulted in a case involving the validity of a statute of North Carolina requiring carriers to keep open for public inspection a record of shipments of liquor for delivery within dry areas in the state. Agents of the Seaboard Airline Railway refused to permit a private citizen to inspect its records showing deliveries at the City of Raleigh, the citizen being desirous of securing evidence against certain parties in the city thought to be violating local liquor laws. Criminal action was begun by the state. The railroad company contended that the state statute was an unconstitutional interference with interstate commerce not covered by the Webb-Kenyon Act; and that the state law was in conflict with a federal statute of 1910<sup>124</sup> forbidding carriers to disclose or to permit to be acquired by other than shipper or consignee information about shipments that might be detrimental to either, unless in response to legal process issued by a state or a federal court or state or federal officers in the execution of their office, or by any duly authorized officer or person seeking such information for prosecution of persons accused of crime.

The state Supreme Court denied both contentions. It held that, if there was a conflict with the commerce clause or the federal statute, the Webb-Kenyon Act was controlling in either event.<sup>125</sup> The federal act eliminated any question of conflict with the com-

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by the Court was, of course, contrary to the holding of the Supreme Court in the *Clark Distilling Company* case, decided later.

<sup>121</sup> *State v. Owen*, 97 Wash. 466, 166 Pac. 793 (1917); *State v. Warburton*, 97 Wash. 242, 166 Pac. 615 (1917); *State v. Great Northern Ry. Co.*, 97 Wash. 137, 165 Pac. 1073 (1917).

<sup>122</sup> *State v. Great Northern Ry. Co.*, 97 Wash. 137, 143, 167 Pac. 1117 (1917).

<sup>123</sup> *Ranier Brewing Co. v. Great Northern Pacific S. S. Co.*, 259 U. S. 150 (1922).

<sup>124</sup> Act of June 18, 1910, 36 Stat. 539, 551, 553.

<sup>125</sup> *Seaboard Airline Ry. v. North Carolina*, 169 N. C. 295, 84 S. E. 283 (1915).

merce clause; and since the Webb-Kenyon Act was a later expression of the will of Congress, it must be regarded as a modification of the earlier act permitting the state regulation to apply. Upon review of the case the United States Supreme Court took the same position upon the question of the effect of the earlier federal statute in restraining state action. By reason of the Webb-Kenyon Act earlier federal statutes relating to interstate commerce in intoxicating liquors "ceased to be paramount in respect to them."<sup>126</sup>

These rulings of the Supreme Court seemingly settled the point whether any inhibitory force should be ascribed to existing federal enactments regarding commerce in intoxicating liquors as against state regulations applying to the same subjects. The Webb-Kenyon Act not only denied the protective silence of Congress on commerce in liquors, but also modified all previous positive ex-

<sup>126</sup> *Seaboard Airline Ry. v. North Carolina*, 245 U. S. 298, 304 (1917). Lower courts had difficulty in accepting in full measure this pronouncement regarding the effect of the Webb-Kenyon Act on earlier legislative provisions affecting commerce. In *West Jersey and Seashore R. R. Co. v. City of Millville*, 91 N. J. Law 572, 103 Atl. 245 (1918), it was held that a city ordinance prohibiting deliveries of liquors to clubs, lodges, and associations and requiring carriers to keep open their books for inspection of local officers was invalid because of conflict with the 1910 law concerning disclosure of information by interstate carriers. The court also held that only state statutes and not local ordinances were meant to be covered by the Webb-Kenyon Act. On the latter point its position was at variance with that of other state courts.

In *State v. Intoxicating Liquors*, 119 Me. 1, 109 Atl. 257 (1920), the Supreme Court of Maine was confronted with the question whether state officers might legally seize a consignment of imported liquors held under bond for payment of import duties. The state court disallowed the seizure, maintaining that the Webb-Kenyon Act, upon which reliance was placed to justify it, was "absolutely independent of and unconnected with the revenue laws of the United States and the collection of duties upon imports; and it cannot be forced to repeal by implication an essential branch of those laws." *Ibid.*, p. 11. There was a special reason for not allowing state power to attach in this case, since the federal government had a claim against the consignment for collection of import duties. Nevertheless, it is difficult to reconcile this opinion with the rulings of the Supreme Court regarding the effect of the Webb-Kenyon Act on prior federal regulations of interstate commerce. If the Webb-Kenyon Act authorized a relaxation of federal regulations in favor of state power in the interstate field, it should have been considered to have the same effect in the field of foreign commerce. By its terms the Webb-Kenyon Act applied equally to foreign and interstate shipments. Under the principle of the Maine case the foreign importer would have been given federal protection in introducing his goods into a prohibition state, when he had not yet actually paid a tax due the federal government. Yet the same right was denied a domestic producer who had discharged his revenue obligations to the United States Government.

pressions of Congressional will as found in federal regulations. The contention that Congress by this act was permitting the states to modify its own regulations could be met more or less satisfactorily by the answer that it was the will of Congress, not that of the states, which effected the modifications in these federal regulations to accommodate them to state policy.

But embarrassing questions still remained. If the basis upon which state authority in reference to interstate liquor shipments was founded was a Congressional declaration denying their "interstate character," how might *any* federal regulations continue to apply to them? They no longer possessed that character which was the basis for the exercise of federal authority to regulate them. Moreover, what would be the effect of a later federal statute applying to liquors previously declared by the Webb-Kenyon Act to have been divested of "interstate character"? Would it not be a tacit repeal of the Webb-Kenyon Act at least so far as the new regulations applied? An exercise of the power to regulate must necessarily imply the existence of an interstate commercial subject to be regulated and a resumption of federal control over it.

These considerations gave the Supreme Court of Michigan concern in the case of *People v. Keeley*.<sup>127</sup> The question was raised whether state regulations were applicable to shipments of intoxicating liquors in interstate commerce in view of the fact that Congress, by adoption of the Reed Amendment in 1917<sup>128</sup> prohibiting the shipment of intoxicating liquors into prohibition states, had apparently reasserted regulatory authority over this subject to the exclusion of state authority. The Court held unanimously that shipments of liquors into prohibition states must be regarded as falling within exclusive federal control in view of the later act. A conviction under the state prohibition law based upon the Webb-Kenyon Act was accordingly reversed.

This seems to have been a logical conclusion to reach, considering the judicial reasoning on which the Webb-Kenyon Act was upheld. The offense in question was the shipment of liquor into the state in violation of state regulations. The Reed Amendment forbade all shipments of liquors into a state which prohibited the manufacture and sale of intoxicants for beverage purposes, as did Michigan. This later exercise of authority by Congress would

<sup>127</sup> 213 Mich. 115, 181 N. W. 990 (1921).

<sup>128</sup> Act of March 3, 1917, c. 162, sec. 5, 39 Stat. 1039.

seem to have completely removed the subject of regulating importations from the control of dry states.<sup>129</sup> Under the rule of federal supersedure further regulation by these states was at end, unless their regulations were in conformity with this later expression of will by Congress. Owing to the relatively brief period during which the Reed Amendment was enforced the Supreme Court was able to avoid facing the question of its bearing upon the Webb-Kenyon Act.<sup>130</sup> In any event, it seems clear from the legislative history of the Reed Amendment that the intent of Congress was to take the matter of regulation of liquor importations out of the hands of the states to which the rigid prohibition of the later act applied.<sup>131</sup>

A somewhat related question was raised in a South Carolina case in 1916. The state Supreme Court held that the Webb-Kenyon Act did not authorize a state to discriminate against interstate commerce by restricting the amount of liquor which might be purchased by an individual for personal consumption to one

<sup>129</sup> There was no clause in the Reed Amendment saving to states the powers enjoyed by them under the Webb-Kenyon Act. The Reed Amendment contained a proviso stating that it should not be construed to authorize the shipment of liquors into states in violation of their laws. This was obviously intended as a protection for those states to which the prohibitions of the Reed Amendment were inapplicable and had no bearing upon prohibition states.

<sup>130</sup> In *Sickel v. Commonwealth*, 124 Va. 821, 97 S. E. 783, 99 S. E. 678 (1919), the same question was presented as in the *Keeley* case. The Virginia court, holding to a narrow and technical construction of the terms of the state indictment under which a conviction was obtained, ruled that the offenses charged under the state law were not covered by the terms of the Reed Amendment. Upon rehearing, after the Supreme Court of the United States had sustained the Reed Amendment in *United States v. Hill*, 248 U. S. 420 (1919), the ruling in the case was reaffirmed. The United States Supreme Court refused a writ of error on the ground of want of jurisdiction. *Sickel v. Commonwealth*, 254 U. S. 619 (1921).

The same point was involved in the case of *Ex parte Pratt*, 83 W. Va. 51, 97 S. E. 301 (1918). The Court held that there was no conflict between the Reed Amendment and the state regulations in question. In *McCormick and Co. v. Brown*, 286 U. S. 131 (1932), the Supreme Court sustained under the Webb-Kenyon Act a West Virginia regulation requiring out-of-state dealers to have permits to ship into the state commodities deemed to be intoxicating under the terms of the state law. The fact that such dealers by the provisions of the National Prohibition Act were authorized to make shipments of the goods in question was held immaterial, since the states enjoyed concurrent power with the federal government to enforce the Eighteenth Amendment and the state regulations in this instance were merely more stringent than federal regulations on the same subject.

<sup>131</sup> See *infra*, pp. 278-281.

gallon a month if delivered by carrier, while not restricting in a similar manner purchases through the state's dispensaries.<sup>132</sup> If the Webb-Kenyon Act denied *interstate character* to interstate shipments in violation of state law, how could such liquors be protected against discrimination by the commerce clause? Certainly there was no hint in the federal act that protection was to be removed only from liquors shipped in violation of *nondiscriminatory* laws. Protection might still have been claimed for interstate shipments under the guarantees of due process and equal protection in the Fourteenth Amendment; but the commerce clause could have no protective force over subjects no longer possessing interstate character in the legal sense. The Supreme Court did not hear any cases involving this point under the Webb-Kenyon Act, and its attitude on the question of discrimination remained undisclosed. After the repeal of the Eighteenth Amendment and the incorporation of the principle of the Webb-Kenyon Act in the Constitution, however, it took the position that liquors in interstate commerce had lost the protection against state legislative discrimination afforded by the commerce clause.<sup>133</sup>

Still another question which the state courts had difficulty in resolving in a fashion consistent with the supporting theory of the Webb-Kenyon Act was whether a state *through* which interstate shipments were being made might interfere with such shipments when there was evident an intent ultimately to violate the laws of a destination state. On the one hand some lower courts held that, since such liquors were not legitimate subjects of commerce, they might be seized in transit, particularly when there was danger that they might be readily diverted and disposed of illegally in the state of transit.<sup>134</sup> Other lower courts construed the Webb-Kenyon Act more narrowly. They denied the right of interference with interstate shipments except to the state of ultimate destination, on the theory that Congress intended to divest such shipments of

<sup>132</sup> *Brennen v. Southern Express Co.*, 106 S. C. 102, 90 S. E. 402 (1916). The Court relied heavily upon the earlier decision in *Scott v. Donald*, 165 U. S. 58 (1897), wherein the Supreme Court refused to permit the enforcement of discriminatory legislation by South Carolina under the Wilson Act. In the instant case the state Supreme Court went on to declare that after adoption of state-wide prohibition in 1915, state regulations might apply equally to interstate and intrastate purchases.

<sup>133</sup> See *infra*, pp. 252 ff.

<sup>134</sup> *Haumschilt v. Tennessee*, 142 Tenn. 521, 221 S. W. 196 (1920). See also *Proctor v. State*, 49 Ga. App. 497, 176 S. E. 96 (1934).

federal protection only to this limited degree.<sup>135</sup> This particular point did not come before the Supreme Court for examination; but the language employed in the *Clark Distilling Company* case implied that the Webb-Kenyon Act was effective only in permitting application of the laws of the destination state to such shipments, through its own administrative authorities.<sup>136</sup>

To hold that liquor shipments to which the Webb-Kenyon Act applied were subjected to the laws of only the state of destination would run counter to the theory upon which it had been sustained. If liquors shipped into a state with intent to violate its laws ceased to be legitimate articles of commerce by reason of their having been deprived of "interstate character," it would appear that such shipments should be considered amenable to state authority at any point in the interstate journey. By the federal statute they were deprived of legitimate character entitling them to entry into interstate commerce as commercial commodities. Their immunity characteristic under the commerce clause was lost at the point where federal jurisdiction over them could be first asserted. This jurisdiction was effective at the moment an interstate movement began if ultimate disposition of a shipment involved an intent to violate the law of the destination state.

By the same token that the state of destination might cause its regulations to operate directly upon such shipments the states through which the shipments were made might likewise do so, provided there was a provable intent to violate the laws of the destination state. To hold otherwise would require a construction of the Webb-Kenyon Act giving it essentially the effect of extending to the boundary limits of the destination state the point of operation of state laws relating to liquors. That part of the interstate transaction which occurred in the state of destination would be cut off from the protection of the commerce clause, but not the remainder.

As has been noted, early proposals for federal divesting legislation of this nature were definitely rejected in Congress upon constitutional grounds. The supporters of the Webb-Kenyon Bill

<sup>135</sup> *Moragne v. State*, 200 Ala. 689, 77 So. 322 (1917) and 201 Ala. 388, 78 So. 450 (1918); *State v. Frazee*, 83 W. Va. 99, 97 S. E. 604 (1918); *Martin and White v. Commonwealth*, 126 Va. 715, 100 S. E. 836 (1919).

<sup>136</sup> *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U. S. 311, 323 (1917). Cf. *United States v. Gudger*, 249 U. S. 373 (1919), holding the Reed Amendment effective only in reference to states of ultimate destination.

in Congress pointed out that it was based on the more tenable theory that Congress, having the power to prohibit all interstate commercial transactions in intoxicating liquors, might prohibit certain ones only, and thereby divest them of federal protection. The contention that Congress possessed authority to "chop off" an interstate transaction at the state line, and submit the excised part to state control, had never commanded general support in Congress. The Supreme Court had not advanced it in sustaining the Webb-Kenyon Act. Yet to hold that law effective in extending the authority of only the state of destination gave to it exactly such a meaning. Its language "prohibiting" commerce of a certain description provided a theoretical basis for sustaining it as a removal of federal protection from certain interstate commercial transactions. But when a pursuance of the implications of that theory would result in undesirable consequences the courts reverted to a theory of Congressional power which had been rejected even by advocates of the Webb-Kenyon Bill in Congress. In actual operation the Webb-Kenyon Act did exactly what the rejected Littlefield and Hepburn-Dolliver bills had proposed to do.

The theory upon which the Webb-Kenyon Act was sustained was thus not followed to its ultimate conclusion in judicial interpretation of the act. Stated briefly and simply, the position of the courts was that this statute divested interstate liquor shipments of the protection against police-power measures of the destination state, while not affecting the authority of Congress to regulate such commerce. The Webb-Kenyon Act placed commerce in intoxicating liquors in the range of subject matters which might be reached by both the commerce power of Congress and the police power of the states. Prior regulations enacted by Congress in relation to commerce in liquors were relaxed to permit operation of the laws of destination states upon this commodity. In the short period during which the act provided the basis for state regulation of interstate commerce in liquors the Supreme Court was not compelled to define in a complete way the respective limits of state and federal authority over this de-legitimized commerce. In particular, the Court did not indicate its position on the question whether the Reed Amendment involved a resumption of exclusive federal control over shipments into those states to which the later federal act applied. There was no opportunity presented enabling the Court to define clearly its position on the question of the

extent to which intoxicating liquors intended to be disposed of illegally in destination states remained under the protection of the federal commerce power. Whether federal revenue measures applying to importation of liquors were modified by the act; whether the states through which liquors were shipped might seize them; whether the receiving state might enforce laws discriminating against out-of-state liquors—none of these questions was clearly answered by the Court.

The result achieved by the Webb-Kenyon Act was nothing more nor less than a reversal of *Bowman v. Chicago and Northwestern Railway Company* and *Rhodes v. Iowa*. The Court failed to seize the opportunity to reverse its error in the earlier liquor cases by holding that commerce in liquors was a subject upon which state measures enacted under the reserved powers of the states might operate without express federal sanction. As has been seen, essentially the same results could have been achieved by such a course as were achieved by reliance upon the federal statute. Long-established constitutional doctrines would not have been seriously affected. The dividing line between subjects which do and those which do not fall under the police power of the state is not fixed absolutely, but changes with conditions.<sup>137</sup> Judicial notice could have been taken of the fact that intoxicating liquors had generally been made the object of restrictive and even prohibitory regulation by the states. The change in public attitude toward this traffic since 1890 would have been a sufficient justification for a reversal of earlier rulings holding national commercial interests to be paramount to police-power objectives of the states. The Court would thus have avoided the task of elaborating a novel theory concerning Congressional power to subject interstate commerce to state control by a de-legitimization formula. Furthermore, the Court would not have so openly appeared to uphold the authority of Congress to overrule it on a question of the constitutional distribution of power between the national government and the states in the regulation of commerce.

<sup>137</sup> Cf. *Noble State Bank v. Haskell*, 219 U. S. 104, 111-112 (1911), *per* Justice Holmes: "It may be said in a general way that the police power extends to all the great public needs.... It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.... With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposite sides."



As is so often true, the general statements of principle by the Court were possibly more sweeping than they were actually intended to be. An involved constitutional interpretation obscured a comparatively simple question and result.<sup>138</sup> The Supreme Court placed reliance upon an express Congressional declaration that state police-power objectives should be considered superior to any national commercial interest represented in the interstate liquor traffic. But in so doing the Court employed language which appeared to concede to Congress authority to "regulate" commerce by delegating to the states control over it. The Court's attempt to justify its holding on the constitutionality of the Webb-Kenyon Act by reference to the "exceptional nature" of the subject matter dealt with did not materially minimize the importance of the principle to which the Court subscribed. The significant point was that the Court recognized the authority of Congress to subject to state regulation matters held judicially to be within the range of exclusive federal power and subject only to uniform federal regulation. The decisions under the Webb-Kenyon Act add strong support to the conclusions stated in connection with the survey of legislation employing the Wilson Act formula of divestment.<sup>139</sup> Congress, and not the Court, was conceded in this instance to be the final arbiter on the limits of state authority in the regulation of foreign and interstate commerce.

<sup>138</sup> Cf. the statement of Thomas Reed Powell in "Indirect Encroachment on Federal Authority by the Taxing Authority of the States," 32 *Harvard Law Rev.* 902, 930 (June, 1919): "In the realm of constitutional law, courts are fond of professing that it is not they that speak, but the Constitution that speaketh in them, even in settling such disputes as this study has chronicled, concerning which concededly the Constitution is silent. Where the Constitution is not wholly mum, it often speaks with such a still, small voice that only a bare majority of the court can hear its echo. Yet the judicial opinions seldom recognize the patent fact. So long as judges pose as automatons when they are in fact wise arbiters of public policy and practical expedience, they necessarily hide their wisdom under the bushel of a supposed constraining conceptualism, which confuses much that would otherwise be simple and clear. The wonder is that wisdom so generally finds its way and controls the actual adjudications which together make up the law. This could hardly be, if doctrine played any such potent part in shaping the course of the decisions as the opinions of the judges would lead us to believe."

<sup>139</sup> *Supra*, pp. 102-103, 111.

## CHAPTER VII

### DIVESTMENT BY CONSTITUTIONAL PROVISION: THE TWENTY-FIRST AMENDMENT

THE advent of national prohibition in 1919 did not sweep away the Webb-Kenyon Act, although the adoption of the National Prohibition Act had the effect of relegating it to the background. The Webb-Kenyon Act was held not to have been repealed by the adoption of either the Eighteenth Amendment or the National Prohibition Act.<sup>1</sup> The adoption of the Twenty-first Amendment and the repeal of the Volstead Act likewise had no bearing upon the continued effectiveness of the Webb-Kenyon Act.<sup>2</sup> Nevertheless, to eliminate any doubt on this point, Congress included in a revision of liquor statutes in 1935 a provision reenacting the Webb-Kenyon Act in language identical with that of the original statute.<sup>3</sup>

The chief significance of the Webb-Kenyon Act at present lies, however, in the fact that its basic principle has been incorporated in the Twenty-first Amendment of the Constitution. Section 2 of this Amendment reads: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The history of the adoption of this section of the amendment indicates that it was included for the purpose of insuring beyond all possibility of legislative or judicial overthrow the principle of subjection of the interstate liquor traffic

<sup>1</sup> *McCormick and Co. v. Brown*, 286 U. S. 131, 141 (1932).

<sup>2</sup> *Premier-Pabst Sales Corp. v. McNutt*, 17 F. Supp. 709 (S. D. Ind.) (1935). *Dugan v. Bridges*, 16 F. Supp. 694 (N. H.) (1936), appeal dismissed, 300 U. S. 684 (1937); *Premier-Pabst Sales Corp. v. Grosscup*, 12 F. Supp. 970 (E. D. Penn.) (1935), affirmed, 298 U. S. 226 (1936); *General Sales and Liquor Co. v. Becker*, 14 F. Supp. 348 (E. D. Mo.) (1936).

<sup>3</sup> Act of August 27, 1935, c. 740, sec. 202(b), 49 Stat. 877; now found in 27 U. S. G. A. (1940 Supp.), sec. 122. The provision was included in a recommended revision of liquor enforcement laws originating with the Treasury Department.

to state control. The question which had plagued Congress and the courts so much in the preprohibition era was to be settled once and for all.

Party platforms in 1932 promised repeal of the Eighteenth Amendment, but did not call specifically for inclusion of the Webb-Kenyon formula in the repealing amendment.<sup>4</sup> Advocates of repeal almost succeeded in forcing through the House an amendment proposal simply repealing the Eighteenth Amendment early in the second session of the Seventy-second Congress, immediately following the 1932 election.<sup>5</sup> The Senate, acting more deliberately, reported from the Judiciary Committee a substitute for the outright repeal proposal of Senator Blaine, of Wisconsin.<sup>6</sup> The substitute proposal embraced four clauses, the first calling for repeal of the Eighteenth Amendment and the second prohibiting the transportation or importation of intoxicating liquors into any state or territory for delivery or use therein in violation of its laws. The second section was explained as being designed to allay fears concerning the constitutionality of the principle embodied in the Webb-Kenyon Act and to insure the continuance of the policy of state protection embodied in that law.<sup>7</sup>

The debate in the Senate on the repealing amendment dealt extensively with those parts of the proposal designed to prevent the return of the saloon, as well as with the ratification procedure to be employed. The second section of the committee substitute was not made a matter of controversy to any great extent. Letters

<sup>4</sup> The Republican platform called for a revision of the Eighteenth Amendment by provisions placing the question of liquor control in the hands of the states, subject to a guarantee against the return of the saloon and "subject always to the power of the Federal Government to protect those States where prohibition may exist." The Democratic platform called for outright repeal, but urged adoption of measures by the States preventing the return of the saloon, promoting temperance, and "bringing the liquor traffic into the open under complete supervision and control by the States." *Cong. Rec.*, 72d Cong., 2d Sess., p. 4144.

<sup>5</sup> *Ibid.*, p. 12. The proposal received 272 votes as against 144, only six votes short of the required two-thirds majority.

<sup>6</sup> *S. Rept.* 1022, 72d Cong., 2d Sess., on S. J. Res. 211.

<sup>7</sup> See the remarks of Senator Blaine, of Wisconsin, *Cong. Rec.*, 72d Cong., 2d Sess., p. 4141: "In the case of Clark against Maryland Ry. Co. there was a divided opinion. There has been a divided opinion in respect to earlier cases, and that division of opinion seems to have come down to this very late day. So, to assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line."

were submitted from representatives of the Constitutional Liberty League and the Association Against the Prohibition Amendment objecting to the inclusion of the divestment section on the ground that it was legislative matter dealing with a subject better left to Congressional discretion.<sup>8</sup> Administration leaders, apparently yielding to this point of view, prepared to eliminate it. Senator Robinson, of Arkansas, directing the forces working for adoption of a repeal amendment, offered a motion to strike the second section from the proposal.

Strenuous objection was made to this motion by Senator Borah, of Idaho. He pointed out that the Webb-Kenyon Act, which the section proposed to constitutionalize, had been vetoed upon constitutional grounds by President Taft. Furthermore, it had been sustained by a divided Court on which there sat at present not only the dissenting justices in the *Clark Distilling Company* case, but also Justice Sutherland, who was one of the chief critics of the Webb-Kenyon Act in the Senate when that law was under consideration there. A reversal of the Court's attitude on the question of the Webb-Kenyon Act's constitutionality was not without the range of possibility. There remained also the danger of repeal of the law by a hostile Congress. Hence, he urged, the only safe course to pursue, if it was honestly desired to protect the dry states, was to write the principle of the Webb-Kenyon Act into the proposed amendment.<sup>9</sup>

The plea proved effective. The motion to strike the divesting clause from the amendment proposal was withdrawn. This section remained in the amendment proposal as passed by the Senate and it attracted little opposition when the joint resolution was given House approval. In all probability its inclusion in the repeal proposal helped to speed ratification by the states.

Judicial exegesis and theorizing had failed to dispel the doubt concerning the constitutionality of the Webb-Kenyon Act and to give assurance that a determined attack might not lead to its overthrow or impairment by the courts. Although the language of the Twenty-first Amendment was somewhat different from that of the statute, there was no attempt to disguise the fact that the purpose was to incorporate the substance of the statute in the Constitution, thereby giving the principle of state control an un-

<sup>8</sup> *Cong. Rec.*, 72d Cong., 2d Sess., pp. 1621, 1622.

<sup>9</sup> *Ibid.*, p. 4170.

shakable foundation. Notwithstanding this close connection between the statute and the second section of the Twenty-first Amendment, the courts in construing state powers under the latter have broken away from precedents set in cases dealing with the law from which it sprang. The Twenty-first Amendment constitutionalized the Webb-Kenyon Act but not necessarily the judicial interpretation which had been given it by the courts. In particular, a liberalized judicial attitude has been manifested with reference to state revenue and regulative measures designed to give competitive advantages to local liquor manufacturers and dealers.

Questions of interpretation arising under the divestment clause of the Twenty-first Amendment relate to its effects upon: (1) the commerce clause as a barrier to the exercise of state powers in connection with liquor importations; (2) the individual guarantees of the Fourteenth Amendment as limitations upon state powers in dealing with the introduction of liquors, (3) state powers over liquors in process of transshipment to other states; (4) the authority of states in controlling liquor exports; and (5) federal power to regulate interstate and foreign commerce in liquors. Analysis of judicial decisions so far made<sup>10</sup> on these points goes far toward demonstrating that divestment of intoxicating liquors by constitutional amendment has achieved a greater expansion of state power than Congress achieved by legislative enactment based on the same formula.

Judicial examination of the effect of the divesting section of the Twenty-first Amendment in releasing state power was first required in cases involving alleged discriminatory taxes upon liquor

<sup>10</sup> For discussion of cases arising under the second section of the Twenty-first Amendment see Robert H. Skilton, "State Power under the Twenty-first Amendment," 7 *Brooklyn Law Rev.* 342 (March, 1938); Joe de Ganahl, "The Scope of Federal Power over Alcoholic Beverages since the Twenty-first Amendment," 8 *George Washington Law Rev.* 819, 875 (March, April, 1940); Joseph E. Kallenbach, "Interstate Commerce in Intoxicating Liquors under the Twenty-first Amendment," 14 *Temple University Law Quart.* 474 (July, 1940); Harold Epstein, "Intoxicating Liquors in Interstate Commerce: Validity of Discriminatory State Legislation," 25 *California Law Rev.* 718 (Sept., 1937); Howard S. Friedman, "State Regulation of Importation of Liquor under the Twenty-first Amendment," 21 *Cornell Law Quart.* 504 (April, 1936), and notes, "Liquor Control: The Latest Phase," 38 *Columbia Law Rev.* 644 (April, 1938), "Constitutional Discrimination under the Twenty-first Amendment," 33 *Illinois Law Rev.* 710 (Feb., 1939), and "Power of States to Regulate Manufacture and Sales of Liquor under the Twenty-first Amendment," 14 *New York University Law Quart. Rev.* 361 (March, 1937).

importations. Some lower federal courts took the position that state revenue regulations which discriminated against imported liquors were invalid, so long as a legitimate traffic in liquors was recognized by a state. The divesting clause was held to justify an application of state revenue laws to the traffic entering the state only to the same extent that the intrastate traffic was similarly burdened.<sup>11</sup> One of these rulings was brought before the Supreme Court for review. The case involved the validity of a California "beer importers' license tax" of five hundred dollars on every establishment in the state handling imported beer. Handlers of locally produced beer were required to pay a license fee of only fifty dollars.

In sustaining this statute Justice Brandeis, speaking for the Court, maintained that the purpose of the Twenty-first Amendment was to place the subject of liquor importations under full state control, denying any force whatever to the commerce clause as a barrier to state action.<sup>12</sup> The Court declared that no limitation of the "broad language" of the Amendment should be drawn from circumstances connected with its history or from the decisions of the Court on the Wilson Act, the Webb-Kenyon Act, or the Reed Amendment. The system of state control envisioned by the Twenty-first Amendment might involve the prohibition of competing importations, the discouragement of importations by heavy imposts, or the "channelization" of desired importations by confining them to a single consignee.<sup>13</sup> Moreover, in answering the contention that the state regulation in question violated the guarantee of equal protection of the laws in the Fourteenth Amendment, the Court declared that "a classification recognized by the Twenty-

<sup>11</sup> *Pacific Fruit and Produce Co. v. Martin*, 16 F. Supp. 34 (W. D. Wash.) (1936); *Young's Market Co. v. State Board of Equalization*, 12 F. Supp. 140 (S. D. Calif.) (1935).

<sup>12</sup> *State Board of Equalization v. Young's Market Co.*, 299 U. S. 59 (1936). In accord with this ruling on the effect of the divesting clause in eliminating the commerce clause as a barrier to state laws operating upon liquor imports were *Dugan v. Bridges*, 16 F. Supp. 694 (N. H.) (1936), appeal dismissed, 300 U. S. 684 (1937), *Premier-Pabst Sales Co. v. Grosscup*, 12 F. Supp. 970 (E. D. Penn.) (1935), affirmed, 298 U. S. 226 (1936), *General Sales and Liquor Co. v. Becker*, 14 F. Supp. 348 (E. D. Mo.) (1936); *Premier-Pabst Sales Corp. v. McNutt*, 17 F. Supp. 709 (S. D. Ind.) (1935); *State v. Ailuno*, 222 Iowa 1, 268 N. W. 179 (1936); *State v. Andre*, 101 Mont. 366, 54 Pac. (2d) 566 (1936); *People v. Ryan*, 248 App. Div. 236, 289 N. Y. S. 141 (1936), reversed on other grounds, 217 N. Y. 119, 8 N. E. (2d) 313 (1937).

<sup>13</sup> *State Board of Equalization v. Young's Market Co.*, 299 U. S. 59, 63 (1936).

first Amendment cannot be deemed forbidden by the Fourteenth."<sup>14</sup> This was ominous language, implying that the Twenty-first Amendment not only abrogated the commerce clause as a limitation upon state power in regulating liquor importations, but freed the states likewise from the limitations of the Fourteenth Amendment. The point was obscured somewhat, however, by statements in the opinion indicating that the Court was not fully persuaded that the statute in question violated the guarantee of equal protection.

Reassured by the broad affirmations of the Supreme Court in this instance, state and federal courts went to great lengths in upholding state authority to deal with the importation of liquors through interstate channels. Regulations and tax measures plainly designed to protect local producers and dealers in competing for the local market were adopted in many states. Such discriminations at length led to retaliatory legislation by other states. Thus, when inspectional and handling requirements of Michigan operating to discourage the introduction and sale of out-of-state beer were held valid,<sup>15</sup> administrative authorities in Ohio promptly responded by adopting regulations similar to those of Michigan and directed solely against Michigan beer. The regulations were sustained by the Ohio Supreme Court.<sup>16</sup> In 1937 the legislatures of Michigan, Missouri, and Alabama enacted statutes prohibiting the entry of liquor products into those states from other states which discriminated against the products of their own respective producers.<sup>17</sup> When cases arose under two of these statutes present-

<sup>14</sup> *Ibid.*, p. 64.

<sup>15</sup> *Zukaitis v. Fitzgerald*, 18 F. Supp. 1000 (E. D. Mich.) (1936). The ruling sustained the Michigan Liquor Control Law of 1933 and administrative regulations adopted thereunder by which an inspection fee of twenty-five cents a barrel was imposed on out-of-state beer; wholesalers of beer were limited to handling the products of not more than two local and one out-of-state manufacturer; and out-of-state dealers were required to use specially designated warehouses and to observe special requirements in the handling of shipments, including the furnishing of a surety bond of one thousand dollars.

<sup>16</sup> *State v. Davis*, 132 Ohio St. 308, 7 N. E. (2d) 652 (1937).

<sup>17</sup> *Michigan Public Acts*, 1937, No. 281, sec. 40; *Missouri Laws*, 1937, p. 536; *Alabama General and Local Acts, Extra Sess.*, 1936-1937, No. 86. Subsequent administrative regulations under the Michigan law banned beer importations into Michigan from Maine, Maryland, Nevada, Indiana, New Hampshire, North Carolina, Pennsylvania, Tennessee, Vermont, and Washington. Administrative regulations under the Missouri law barred importations into Missouri from Indiana, Pennsylvania, Michigan, and Massachusetts. See cases cited *infra*, p. 255, note 19. The Missouri statute was repealed in 1939. *Missouri Laws*, 1939, p. 821.

ing the question of their constitutionality under the commerce clause and the guarantees of the Fourteenth Amendment, they were sustained in rulings by district courts.<sup>18</sup>

These decisions were affirmed by the Supreme Court.<sup>19</sup> Its language left no doubt that the divestment section of the Twenty-first Amendment released the states from the limitations of both the commerce clause and the Fourteenth Amendment in dealing with liquor importations. Incorporation of the Webb-Kenyon Act principle in the Constitution had bestowed upon the states complete freedom of action with reference to the regulation of liquor importations for delivery or use within their respective boundaries. The states were enabled to use their powers over this subject matter for any purpose deemed desirable. What Congress could not have done by statute, that is, sweep away completely the commerce clause and the restrictions of the Fourteenth Amendment as barriers to state power in regulating liquor importations, it found it could do by employment of the same formula in a constitutional amendment.

The basic issues concerning state power over the introduction of liquors in interstate commerce have thus been resolved conclusively in favor of state authority. The Supreme Court has not yet made a ruling upon the question of the power of a state, not of ultimate destination, to apply its laws to liquors in process of transshipment to another state. Decisions of lower courts have indicated that shipments of liquors are immune from the laws of the states through which they may be transported, provided there is no evidence of intent to dispose of them illegally in the transit states. Thus in *Williams v. Commonwealth*<sup>20</sup> the Virginia Supreme Court held invalid, as to through shipments, a Virginia law requiring a

<sup>18</sup> *Indianapolis Brewing Co. v. Liquor Control Commission*, 21 F. Supp. 969 (E. D. Mich.) (1938); *Finch and Co. v. McKittrick*, 23 F. Supp. 214 (E. D. Mo.) (1938).

<sup>19</sup> *Indianapolis Brewing Co. v. Liquor Control Commission*, 305 U. S. 391 (1939); *Finch and Co. v. McKittrick*, 305 U. S. 395 (1939). To the same effect was *Mahoney v. Joseph Triner Corp.*, 304 U. S. 401 (1938), overruling *Triner Corp. v. Mahoney*, 20 F. Supp. 1019 (Minn.) (1937), and *Triner Corp. v. Arundel*, 11 F. Supp. 145 (Minn.) (1935). In this case the district court had issued an injunction against enforcement of a Minnesota statute of 1935 forbidding the importation of liquors of an alcoholic content of twenty-five per cent or more unless they bore a trade-mark registered with the United States Patent Office. No similar requirement was imposed by the statute upon liquors produced locally.

<sup>20</sup> 169 Va. 857, 192 S. E. 795 (1937).



permit and the posting of a bond by carriers transporting liquors through the state. A provision of the same statute requiring the carrier in such circumstances to follow a prescribed route was likewise held invalid.<sup>21</sup> The same court has indicated, however, that the burden of proof that liquors are being transported in interstate commerce through the state is upon the possessor. A mere allegation to that effect is not an adequate defense against charges of violating local liquor laws.<sup>22</sup>

Special circumstances may exist to justify a state seizure of liquors in transit, according to the ruling of the Supreme Court of Pennsylvania in *Commonwealth v. One Dodge Motor Truck*.<sup>23</sup> In this case Pennsylvania authorities had seized a truck en route from Pittsburgh to Baltimore for failure to obtain a transportation permit. The vehicle carried a load of liquors, some of which were in process of shipment from Louisville, Kentucky, to Baltimore. The remainder had been taken on at Pittsburgh. Since a break in the journey had been made at Pittsburgh and a part of the shipment had originated there, the court ruled that the Pennsylvania law regulating transportation was applicable and the seizure was valid, under the Webb-Kenyon Act and the Twenty-first Amendment. It conceded that if the original carrier had made the trip continuously through the state and had carried only out-of-state liquors, the seizure would have been invalid. In the special circumstances of the case the court's view of the effect of the divesting section of the Amendment seems quite defensible.

The attitude which the Supreme Court would adopt respecting the power of a state of transit to impose its regulations upon through shipments of liquors is somewhat problematical. Only liquors intended for illegal "delivery or use" within a destination state are subjected to state power under the Twenty-first Amendment. It is unlikely that the Court would go to the length of sustaining a seizure of liquors by a state of transit on the theory that such liquors, because of an ultimate illegal delivery or use contemplated by the possessor, had become de-legitimized and therefore subject to the laws of any state through which they were transported. It will be noted that in a few instances seizures

<sup>21</sup> *Surles v. Commonwealth*, 172 Va. 573, 200 S. E. 636 (1939).

<sup>22</sup> *Whitaker v. Commonwealth*, 170 Va. 621, 195 S. E. 486 (1938).

<sup>23</sup> 123 Pa. 120, 191 Atl. 590 (1937), affirming 123 Pa. Super. 311, 187 Atl. 461 (1936).

under these circumstances by the state of transit had been held valid under the Webb-Kenyon Act by state courts.<sup>24</sup> The language of the divesting section might properly be held to provide a basis for sustaining any reasonable regulations respecting transportation which a transit state deems necessary to insure observance of its own laws concerning delivery or use of liquors. In view of existing federal laws on the subject of interstate transportation of intoxicating liquors it does not appear probable that the states will attempt to exercise their authority on this aspect of the subject to the fullest possible degree, but will place reliance primarily upon federal regulations.

Somewhat related to the question of state power over liquors in process of transshipment is that concerning the authority of a state to regulate the exportation of liquors locally produced or locally possessed. The Twenty-first Amendment has no direct application to regulations of this character. It releases state power only with respect to the importation or transportation of liquors *into* a state. The Supreme Court has recognized the authority of a state under its police power to regulate in a nondiscriminatory manner the transportation of locally produced liquors in interstate commerce.<sup>25</sup> This ruling involved no significant extension of state authority beyond that which had been conceded long before the adoption of the Twenty-first Amendment.<sup>26</sup> Hence no reliance was placed directly upon the divesting section by the Court in reaching this conclusion. A further question in this connection is raised, however, by state revenue measures applying to the exportation of liquors. It is a common practice of the states to grant exemptions from or reductions in the excise taxes levied upon liquors produced for export.<sup>27</sup> A few states, on the other hand, impose special taxes upon liquors held for exportation. Dealers

<sup>24</sup> See *supra*, p. 244.

<sup>25</sup> *Ziffirin, Inc. v. Reeves*, 308 U. S. 132 (1939).

<sup>26</sup> In *Kidd v. Pearson*, 128 U. S. 1 (1888), the authority of a state to prohibit the manufacture of intoxicating liquors destined for export was sustained. The Court noted in the *Reeves* opinion that the greater power of the state to prohibit absolutely the production of liquors for export necessarily embraced the lesser power of permitting such production under special conditions respecting the transportation of the goods involved.

<sup>27</sup> At least twenty-five states provide for remission or reduction of manufacturing excise taxes on liquors produced for export. Marketing Laws Survey, *Comparative Charts of State Statutes Illustrating Barriers to Trade between States* (1939), pp. 63-71.

who may be engaged in interstate sale as well as local sale of liquors are generally required to pay license taxes.

The imposition of general license taxes applicable to dealers who may engage in selling liquors in interstate commerce does not raise a serious question of constitutional power.<sup>28</sup> The imposition of special taxes bearing upon the export trade does raise such a question. In cases involving taxes levied upon liquor exporters lower courts have sustained these charges, apparently relying in some degree upon the special powers conferred upon the states by the Twenty-first Amendment.<sup>29</sup> It is difficult to see how the Twenty-first Amendment can properly be held to have the effect of enlarging state authority over the exportation of liquors. Such power as the state possesses in this regard must be derived from its inherent authority to legislate under the police power. Discriminatory revenue measures singling out liquors produced for export or the liquor-exporting business as subjects of taxation can hardly be justified on the basis of the special provisions regarding state authority in the Twenty-first Amendment.<sup>30</sup>

The effect of the second section of the Twenty-first Amendment upon federal power to regulate interstate and foreign commerce in liquors has been partly determined by judicial interpretation, but certain issues remain to be settled. The courts have made clear that federal power to regulate interstate and foreign commerce in liquors has not been terminated. In two recent cases the constitutionality of the Federal Alcohol Administration Act,<sup>31</sup> which rests in part upon the commerce clause, was attacked on the ground that the commerce clause provides no basis for federal action since the divesting section of the Twenty-first Amendment has submitted the subject to the complete and exclusive control of the states. The contention was found to be without merit by lower federal courts.<sup>32</sup> In denying an appeal in one of these cases

<sup>28</sup> Cf. *Schenley Distributors, Inc. v. State Tax Commissioner*, 18 N. J. Misc. 266, 12 Atl. 638 (1940).

<sup>29</sup> *McCarroll v. Clyde Collins Liquors, Inc.*, 198 Ark. 896, 132 S. W. (2d) 19 (1939); *Oldtyme Distillers v. Gordy*, 17 F. Supp. 424 (Md.) (1936).

<sup>30</sup> Cf. the note "Twenty-first Amendment—Regulation of Shipments of Liquor Out of a State," 40 *Columbia Law Rev.* 135 (Jan., 1940).

<sup>31</sup> Act of Aug. 29, 1935, 49 Stat. 977, 27 U. S. C. A. (1940 Supp.), secs. 201 ff.

<sup>32</sup> *Jameson and Co. v. Morgenthau*, 25 F. Supp. 771, 773 (D. C.) (1938); *Arrow Distilleries, Inc. v. Alexander*, 109 F. (2d) 397 (C. C. A., Seventh) (1940). Cf. also *Hayes v. United States*, 112 F. (2d) 417 (C. C. A., Tenth) (1940).

on procedural grounds, the Supreme Court stated that there was "no substance in the contention."<sup>33</sup> Without regard to the power of Congress to regulate interstate and foreign commerce in liquors under the commerce clause or under its authority to protect national revenues, federal power to act can be derived from the divesting section itself. Indeed, controversy has developed in the past two or three years over the question of the extent to which Congress is obligated by this clause to enact legislation reinforcing state laws relating to the introduction of intoxicating liquors in interstate commerce.<sup>34</sup> Moreover, the logic of the situation requires continued federal control over interstate and foreign commerce in liquors to some extent; for the states, even though they have been granted supreme authority in regulating incoming shipments of liquors, lack power to regulate interstate and foreign commerce in this subject matter in a complete sense. Their limited jurisdiction does not permit them to deal with it on a national plane.

Thus the basic question regarding a continuance of federal power over interstate and foreign commerce in liquors has been answered. Divestment by constitutional amendment has not achieved a de-legitimization of this subject matter which excludes federal control over it completely.<sup>35</sup> Further questions regarding the relationship between federal and state authority over this subject remain. Are all federal laws and regulations bearing upon the subject of interstate transportation of liquors necessarily subordinate to those of the receiving state? Does the silence of receiving states, that is, their failure to regulate a particular phase of the subject, operate as a bar to the establishment of federal regulations on the theory that the receiving states "will" such commerce to be free except for the regulations they themselves adopt? May a state discriminate in its regulations of commerce between the liquor products of different foreign countries and

<sup>33</sup> *Jameson and Co v. Morgenthau*, 307 U. S. 171, 173 (1939).

<sup>34</sup> See *infra*, pp. 287 ff.

<sup>35</sup> Cf. de Ganahl, *op. cit.*, pp. 875, 891 (April, 1940): "The Twenty-first Amendment should be considered not in the terms of the title of the Webb-Kenyon Act as a clause which divests liquor of its interstate character. If it does that it divests the Federal government of its power. It should be considered rather as an enactment to give the states free rein to legislate on liquor, reserving to the Federal government the right, as always, to regulate up to the point where such Federal regulation conflicts with state regulations."

between foreign and American-produced liquors, and thus set at nought federal trade arrangements with those countries based upon treaties?

It is unlikely that the Court will develop a doctrine of the "silence of the states" as a limitation upon federal power to regulate commerce in liquors. Exclusion of federal authority to this degree is undesirable from the point of view of both the states and the commercial interests involved. Congress and the states should be permitted to enjoy a concurrent authority over the subject, with federal regulations giving way to those of the states only when there is a direct conflict. By defining strictly the phrase "for delivery or use therein" in the divesting section the Court can prevent conflict except as between federal regulations and the regulations of destination states. The police power of the state of origin and of states of transit would have to give way to superior federal regulations, since their authority is not supported by the divesting section of the Twenty-first Amendment.

It has been suggested that the Supreme Court should apply the original-package doctrine of *Brown v. Maryland* and, regardless of the divesting section, hold federal regulations of *foreign* commerce in liquors superior to those of the states.<sup>36</sup> This construction of the Amendment would avoid embarrassing complications where foreign trade and treaty rights are concerned. However, the argument in support of this view, viz., that control over foreign relations is a "sovereign power" which by its nature is not delegable to the states even by constitutional amendment, does not seem defensible. It is of a piece with the argument that the second section of the Twenty-first Amendment could not properly be construed as a relaxation of the individual guarantees of the Fourteenth Amendment. The possible inconveniences that might result from extension of state policies of discrimination into the foreign field are apparent; but they do not constitute an impassable barrier to transfer of power to the states. Upon occasion the federal government has expressly provided by treaty that specified matters regarding foreign trade shall be regulated according to the laws of the states.<sup>37</sup> The exercise or nonexercise of powers already possessed by the states can prove embarrassing to the federal government in

<sup>36</sup> De Ganahl, *op. cit.*, pp. 875 ff.

<sup>37</sup> See *supra*, p. 3.

controlling foreign relations, as experience has shown.<sup>38</sup> A federal district court has already ruled in favor of state authority in a case raising a question of conflict between state liquor-traffic regulations and federal regulations of foreign commerce.<sup>39</sup> There has been no indication that the Supreme Court would not take a similar position upon the question.

Many legal commentators have voiced criticism of a construction of the Twenty-first Amendment freeing the states entirely from the restrictions of both the commerce clause and the Fourteenth Amendment in dealing with liquors introduced through the channels of interstate commerce.<sup>40</sup> Their criticisms have been based principally upon two points: (1) under a commonly accepted rule of construction by which one part of the Constitution should be interpreted in the light of other provisions therein, the Court should have construed the term "laws" as used in the Amendment to refer to laws which were otherwise constitutional except in their imposition of a direct burden upon interstate commerce; and (2) in the light of the historical experience and circumstances out of which the divestment clause of the Amendment originated, the evident purpose of Congress was only to relax the commerce clause as a restraint upon otherwise constitutional police-power measures of the states. Critics have also quite generally called attention to the probable undesirable consequences of a construction of the Amendment which would permit the erection of state trade barriers.

It is probably true that the Court has given a broader effect to the second section of the Amendment than was contemplated by

<sup>38</sup> Cf. James P. Hall, "State Interference with the Enforcement of Treaties," 7 *Proceedings of the American Academy of Political Science* 548 (July, 1917), and Charles C. Hyde, "State Interference with the Enforcement of Treaties: Some Means of Prevention," 7 *Proceedings of the American Academy of Political Science* 558 (July, 1917).

<sup>39</sup> *Wylle v. State Board of Equalization*, 21 F. Supp. 604 (S. D. Calif.) (1937). The case involved the applicability of a California regulation requiring importers of liquors to possess a license issued by the state. The requirement was held applicable to a person introducing one gallon of wine from Mexico, despite the fact that federal customs regulations permitted an individual to bring in such an amount of liquor duty-free.

<sup>40</sup> See the editorial note "Liquor Control: The Latest Phase," 38 *Columbia Law Rev.* 644 (April, 1938); Skilton, *op. cit.*; Friedman, *op. cit.*; R. L. Wiser and R. F. Arledge, "Does the Repeal Amendment Empower a State to Erect Tariff Barriers and Disregard the Equal Protection Clause in Legislating on Intoxicating Liquors in Interstate Commerce?" 7 *George Washington Law Rev.* 402 (Jan., 1939).

those members of Congress who were responsible for its phraseology. Their thought was apparently to enable the dry states to take appropriate action in preventing evasion of their laws. However, there were some expressions of views by individual members which would tend to justify a very broad construction of state powers under the second section. Thus Senator Blaine, of Wisconsin, observed at one point during the deliberations that "the purpose of section 2 is to restore to the States *absolute control* in effect over interstate commerce affecting intoxicating liquors which enter the confines of the States."<sup>41</sup> Representative Lea, of California, criticized the divestment clause for the reason that it would obligate Congress to support "whatever statutory liquor laws the State legislatures see fit to write," and that it would authorize the states to interfere with "legitimate interstate shipments."<sup>42</sup> On the other hand, certain senators stated that the purpose of the second section was only to protect the "dry states."<sup>43</sup> If the Court should have given effect to this stated purpose, the divesting clause would have become practically a nullity in operation, for there are only a few states which might be classified as "dry" at present.<sup>44</sup> Even the advocates of a stricter construction do not maintain that the second section should have been interpreted so narrowly.

By refusing to go beyond the words of the divesting section to find the Congressional intent, the Court was on firm ground. In so doing it followed a well-established rule of constitutional construction.<sup>45</sup> This rule has a logical foundation in that expressions

<sup>41</sup> *Cong. Rec.*, 72d Cong., 2d Sess., p. 4143. Italics mine.

<sup>42</sup> *Ibid.*, p. 2776.

<sup>43</sup> Cf. the remarks of Senator Blaine quoted *supra*, p. 250, note 7; also the remarks of Senator Borah, of Idaho, *Cong. Rec.*, 72d Cong., 2d Sess., p. 4170, and of Senator Wagner, of New York, *ibid.*, p. 4171.

<sup>44</sup> Oklahoma and Kansas forbid the sale of all alcoholic beverages except beer with no more than 3.2 per cent alcoholic content; Mississippi prohibits the sale of all alcoholic beverages except wine and beer of no more than 4 per cent alcoholic content.

<sup>45</sup> W. W. Willoughby, *The Constitutional Law of the United States* (2d ed., 1929), Vol. I, sec. 34; Thomas L. Cooley, *Constitutional Limitations* (8th ed., 1927), p. 142. In *United States v. Wong Kim Ark*, 169 U. S. 649, 699 (1898), Justice Gray declared: "Doubtless, the intention of the Congress which framed and of the States which adopted this [Fourteenth] Amendment of the Constitution must be sought in the words of the Amendment; and the debates in Congress are not admissible as evidence to control the meaning of those words." To the same effect was the statement of Justice Peckham in *Maxwell v. Dow*, 176 U. S. 581, 601 (1900). For an exception in the application of this rule of construction see *Evans v. Gore*, 253 U. S. 245, 260 (1920).

of views by individual members of a legislative body cannot be taken as indicative of the views of all, even when no contrary opinions are advanced. Furthermore, in the formulation of a constitutional amendment the views of the ratifying authority on the meaning of a particular phrase may be at variance with those of the proposing agency.<sup>46</sup> If the language employed in the second section of the Twenty-first Amendment is alone made the basis of interpretation, the broad construction accorded it is reasonably justified. The only limitation concerning conditions under which state laws may not apply to incoming liquors is that set up by the Amendment itself. A state's laws apply to such liquors only when introduced for "delivery or use therein." This language apparently contemplates *any* state laws relating to the introduction of liquors for delivery or use, not merely laws which are otherwise valid except for imposition of a direct burden upon interstate commerce. If the divesting clause is effective in freeing state power from one part of the Constitution, that is, the commerce clause, it is effective in freeing it from other parts as well. It is fair for the Court to assume that if there had been an intent to permit only those laws of the destination state which were *nondiscriminatory* in character to apply to liquor importations, the purpose would have been clearly indicated.

Although the states have shown a decided tendency to use their amplified powers over liquor importations to secure competitive advantages for their own producers and dealers,<sup>47</sup> the action of the Court in construing the divestment section broadly may prove in the end to have been wise judicial statesmanship. Since colonial days the liquor industry, for reasons of public policy, has

<sup>46</sup> Cf. the note "Constitutional Discrimination under the Twenty-first Amendment," 33 *Illinois Law Rev.* 710 (Feb., 1939).

<sup>47</sup> Compilations and digests of state statutes setting up barriers to interstate trade in alcoholic beverages may be found in the Marketing Laws Survey, *Comparative Charts of State Statutes Illustrating Barriers to Trade between States* (1939), pp. 63-71; and in items by Thomas S. Green, Jr., entitled "State Discrimination against Out-of-State Beverages," "State Discrimination against Out-of-State Wines," "State Discrimination against Out-of-State Beers," and "State Discrimination against Out-of-State Distilled Spirits," in a Trade Barrier Research Bulletin series prepared under the auspices of the Council of State Governments in 1939. See also George R. Taylor, Edgar L. Burtis, and Frederick V. Waugh, *Barriers to Internal Trade in Farm Products* (Bureau of Agricultural Economics, 1939), pp. 31-35, and Thomas S. Green, Jr., "Interstate Barriers in the Alcoholic Beverage Field," 7 *Law and Contemporary Problems* 717 (Autumn, 1940).



always been subjected to more or less governmental regulation. The success of the resurrected system of state option, which replaced the policy of extreme restriction under the Eighteenth Amendment, may depend in large measure upon the freedom of the states to adopt whatever methods are deemed appropriate in dealing with the liquor traffic. The fact that a number of states have adopted public monopoly systems of distribution indicates the special status which this trade has come to occupy. The states will not be hampered in carrying out their liquor-control policies by considerations growing out of the national commercial interests affected. The Court has freed itself from the difficult task of trying to define the limits of state power where local interests conflict with national interests in this field of regulation.

It is very improbable that the method of divestment by constitutional amendment will be employed in connection with other commodities. Experience under the Twenty-first Amendment has already demonstrated the danger that lurks in this regulative device. Economic isolationism is fostered to a dangerous degree. The states have so abused their powers by discriminating against out-of-state liquor products that retaliatory action in respect to commerce in other commodities has been threatened. Even though recent developments indicate a reaction by the states against a policy of extreme economic protectionism toward local interests in the liquor industry, the temptation of state legislative and administrative bodies to yield to the demands of local pressure groups remains. Unlike divestment by legislative act, divestment through constitutional amendment offers little or no opportunity for correction of resulting abuses through further federal legislation. It subordinates federal control of commerce to state control, and places undue reliance upon the willingness of states to follow policies of self-restraint in dealing with the commerce involved. For this reason the further extension of state powers by the device of divestment through constitutional provision is neither desirable nor likely to occur.

CHAPTER VIII

FEDERAL PROHIBITIONS OF COMMERCE  
FOR THE PROTECTION OF  
DESTINATION STATES

FEDERAL prohibition of commerce conditioned upon a prospective or consummated violation of state law has become a familiar regulative technique in recent decades. By closing the channels of interstate and foreign commerce to those who would use them to circumvent state laws, Congress has geared its regulations directly to state policy. The purpose may be either to aid in the enforcement of the laws of the states in which commerce originates, or to render support to the laws of the states of destination. In either case, state law determines in a sense the applicability of the protective legislation of Congress. The regulative force applied is that of the national government; but the result achieved is essentially that of regulation of particular phases of commerce by joint action of Congress and the states.

Prohibition or regulation of commerce with a view to supporting directly the laws of the several states constitutes a culmination in the development of federal coöperation with the states through the commerce power. The fundamental purpose in the grant of this power to Congress was to place in its hands a controlling authority to deal with general commercial matters which the states were incompetent to regulate in their several capacities. The grant of authority to Congress did not involve a surrender of power by the states over that commerce which was local in nature. Congress was not long in discovering that, to a large degree, its objectives and those of the states were the same in their respective fields. Hence it displayed a willingness from the beginning to coördinate its commercial regulations with state policies where such a course seemed advisable.

A disposition to coöperate with the states has been manifested in various ways. Thus, in early legislative acts Congress specified

that certain matters—for example, pilotage and quarantines—were to continue to be governed by state laws where interstate and foreign commerce was concerned. As it proceeded to exercise in a fuller measure its own powers over commercial matters, Congress often included saving clauses in its enactments to prevent the overthrow of existing state laws on the same subjects. In other words, Congress instructed the courts not to place a conditionally-exclusive-power construction upon its own acts. As has already been shown, this policy of saving state authority by Congressional legislation was eventually extended to the removal of “constitutional” barriers to the exercise of state power arising by reason of implications drawn from Congressional silence.

The feature common to such federal coöperative measures is the preservation of freedom of action for the states. Provisions of this sort deny that the grant of the commerce power to Congress is to be construed as abrogating state authority to regulate a particular subject; or they state that an exercise of Congressional authority or an assumed exercise of it as implied in Congressional silence is not to be construed as terminating state control over the same subject. Legislation of this type is negative in the sense that it rejects the idea that the existence or the exercise of federal authority over a given phase of commercial activity precludes state action.

Congress furthermore began at an early date to exercise its power over interstate and foreign commerce in a positive manner to support state policies. This so-called “national police-power” legislation may be divided into two categories, depending upon whether it supports state laws and policies incidentally or by direct reference. Legislation falling under the first heading embraces a wide variety of subjects, too numerous to review here.<sup>1</sup> Laws of

<sup>1</sup> Typical statutes of this character are the Act of June 26, 1848, 9 *Stat.* 237, prohibiting the importation of spurious and adulterated drugs; the Act of July 3, 1866, 14 *Stat.* 81, regulating the transportation of explosives; the Act of Feb. 23, 1887, 24 *Stat.* 409, regulating the importation of opium; the Act of March 2, 1895, 28 *Stat.* 963, prohibiting commerce in lottery tickets, the Act of Feb. 8, 1897, 29 *Stat.* 512, prohibiting the shipment of obscene literature in interstate and foreign commerce; the Act of June 10, 1910, 36 *Stat.* 825, forbidding the transportation of women in interstate and foreign commerce for immoral purposes; and the Act of June 24, 1936, 49 *Stat.* 1899, prohibiting the transportation of strikebreakers in interstate commerce. For treatments of the general subject see Robert E. Cushman, “National Police Power under the Commerce Clause of the Constitution,” 3 *Minnesota Law Rev.* 289, 381, 452 (April, May, June, 1919), and Theodore W. Cousins, “The Use of the Federal Commerce Power to Regulate Matters within the States,” 21 *Virginia Law Rev.* 51 (Nov., 1934).

this type involve coöperative action in the broad sense that through them Congress seeks to achieve ends similar to those sought by the states under their police power. Congressional acts of the second type carry cooperative action a step further. By them federal power is exerted to aid the states directly by making federal prohibitions of commerce contingent upon a consummated or intended violation of their laws or regulations. The objective is a more effective enforcement of state laws by making them constructively a part of the system of federal regulations. Federal measures of this character may in some instances be construed as giving Congressional consent to enforcement of the state laws to which they refer.

Regulations of commerce supporting state laws by direct reference fall into two classes, depending upon whether the purpose is to give aid in the enforcement of the laws of sending states or those of receiving states. Federal acts prohibiting the shipment of illegally killed game and "hot" oil illustrate the first class; acts prohibiting the shipment of intoxicating liquors and prison-made goods into states banning their sale illustrate the second. The principles involved are essentially the same in either class of regulation, although the nature of the subject dealt with and the character of the state regulations upon which the federal prohibition is conditioned cause each federal act to present its own peculiar legal problems. Thus a federal statute prohibiting the shipment of illegally killed game from the state of origin and one prohibiting the shipment of illegally produced oil from the state of origin present different problems, owing to the difference in the subject matters which the federal power attempts to reach. On the other hand, a federal prohibition of the shipment of intoxicating liquors into a state where manufacture and sale are banned and a federal prohibition of the shipment of prison-made goods into a state, conditioned upon an intent to violate state laws prohibiting their reception, possession, sale, or use, present different problems because of the difference in the nature of the state laws to which the federal acts refer. While all such regulations of commerce are alike in that they are conditioned upon the existence of restraining laws in the states to which they apply, each act presents issues peculiar to itself by reason of the nature of the subject dealt with and the authority of the state to establish the prohibitory acts upon which the federal regulation is conditioned.

The factors which have led to the use of this method of commercial regulation are varied. In some instances it has been employed because of an assumed constitutional disability in Congress to regulate independently the subject matter concerned. Federal prohibition conditioned upon the violation of state law has been resorted to because no other method was deemed available to Congress. This consideration was clearly responsible for an early use of this regulative technique in an anti-slave-trade statute in 1803. In other instances the conditional-prohibition technique has been employed to overcome the effect of judicial decisions hampering the states in dealing with certain subjects under their own reserved powers. In still other cases this method of regulation has been preferred over direct and independent regulation by Congress because of strong differences of opinion from state to state regarding the desirability of prohibiting commerce in a particular commodity. These different motivations have not been mutually exclusive. On the contrary, they have all entered into the choice of the state-aid method of regulation in respect to some subjects. For example, the Ashurst-Sumners Act, which prohibits the shipment of prison-made goods into a state in violation of its laws, was adopted not only out of consideration for varying state policies in regard to permitting the sale of such goods and the assumed inability of the states to prevent introduction of them under their reserved powers, but also because of doubts concerning the constitutional authority of Congress to prohibit such commerce directly, independently of state laws. Regardless of the causes which have been responsible for the choice of this mode of regulation, the result in every instance has been to set up a regime of regulation in which varying state policies play a prominent part.

Because of this fact the conditional-prohibition method of regulation has been subjected to criticism. It creates a situation in which the commerce to which it is applied is governed in some degree by the varying laws of the states, rather than by a uniform national law. In effect it tends to restore the conditions prevailing prior to the adoption of the Constitution, when the states were free to adopt whatever measures they deemed proper in the regulation of foreign and interstate commerce. This method of regulation has been subjected to assault on constitutional grounds from a number of angles. It has been assailed as violative of the rule of uniformity, upon which the Court leaned so heavily in develop-

ing its doctrine of the exclusiveness of the commerce power. It has been assailed also as being incompatible with the principle of "dual federalism" which the Court has always recognized. On the one hand it has been challenged as an unconstitutional delegation of authority to regulate commerce to the states. On the other hand it has been challenged as an undue extension of federal authority into state affairs by the establishment of penalties in national law for the violation of state laws. These objections on constitutional grounds have so far proved unavailing when offered before the courts. The only bar to a wider use of conditional-prohibition legislation as yet disclosed has been the reluctance of Congress to act.

Although the state-aid formula for regulating commerce has been resorted to most freely in the period since 1900, it originated very early in the nation's history. The subjects to which it has been applied have been varied.<sup>2</sup> Employment of this method of regulation in one field has been the signal for movements to bring about its application in other fields. Most recently it has been strongly urged as an alternative to independent federal regulation of commerce in goods produced under substandard labor conditions. Whether a wider use of this regulative technique is desirable and practicable is a hotly disputed point. A survey of its development is offered not only in the expectation of throwing light on the circumstances which led to its adoption in each case and upon the legal issues involved, but also upon the question of the possibility and desirability of applying it more extensively.

### 1. ADMISSION OF NEGROES

THE first statute passed by Congress in aid of the enforcement of the laws of destination states was an anti-slave-trade law, enacted in 1803. At that time the power of Congress to regulate this traffic was limited by the temporary restraining clause of the Constitution, adopted as a part of the compromise relating to the commerce power.<sup>3</sup> Prevented by this provision from prohibiting the African

<sup>2</sup> A brief survey of legislation of this character is given in Jane Perry Clark, *The Rise of a New Federalism: Federal-State Cooperation in the United States* (1938), Chap. V. See also "Interdependent Federal and State Law as a Form of Federal-State Cooperation," 23 *Iowa Law Rev.* 539 (May, 1938), by the same author.

<sup>3</sup> Article I, sec. 9, cl. 1: "The migration or importation of such persons as

slave trade directly, Congress adopted the expedient of lending active support to the enforcement of the restrictive laws of those states which had legislated against it. The limiting clause of the Constitution clearly implied that, at least so long as the temporary restraint upon federal power endured, the states might deal freely with the question of slave importations. With a growing public opinion against continuance of the African slave trade, most of the seaboard states had taken steps to prohibit it by 1800.<sup>4</sup>

The same influences responsible for the enactment of restrictive state laws had led Congress in 1800 to pass a statute prohibiting the outfitting of ships in American ports for the purpose of engaging in this traffic. The 1803 law was passed in response to a demand for further federal assistance in the enforcement of a policy of restriction against the entrance of Negroes. The immediate occasion for this act was the fear of an impending influx into Southern slave states of free Negroes from Haiti, where there had been a slave revolt in the preceding year.<sup>5</sup>

The 1803 statute<sup>6</sup> threw the full force of federal power behind the existing state laws relating to the admission of Negroes from abroad. Section 1 of the act contained the conditional prohibitory clause. Its text was as follows:

From and after the first of April next, no master or captain of any ship or vessel, or any other person, shall import or bring . . . any negro, mulatto, or other person of color, not being a native, a citizen, or registered seaman, of the United States, or seamen, natives of countries beyond the Cape of Good Hope, into any port or place of the United States, which port or place shall be situated in any state, which, by law, has prohibited, or shall prohibit, the admission, or importation of such negro, mulatto, or other person of color . . .

Violation of this prohibition was made punishable by a fine of one thousand dollars for each person illegally introduced into a state.

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any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person."

<sup>4</sup> For a digest of state slave-trade laws of this period see Winfield H. Collins, *The Domestic Slave Trade of the Southern States* (1904), pp. 109-139; also William E. Burghardt Du Bois, *The Suppression of the African Slave-Trade to the United States of America 1638-1870* (1904), App. B.

<sup>5</sup> Du Bois, *op. cit.*, p. 84.

<sup>6</sup> Act of Feb. 28, 1803, 2 *Stat.* 205. For the debate in Congress on the bill see *Annals of Congress*, 7th Cong., 2d Sess., pp. 424, 459-472.

A second section prohibited entry of vessels into United States ports if there were on board any Negroes, exception being made in the case of vessels carrying Negroes as members of the crew. The penalty for this offense was forfeiture of the vessel. A third section enjoined revenue officers to "notice and be governed" by the laws of the states respecting the admission or importation of Negroes.<sup>7</sup>

It will be noted that the prohibition of the first section applied when any state by law had prohibited, or should prohibit, the introduction of Negroes. The prohibition had a prospective application, covering any state which might at some time subsequent to the passage of the act adopt a policy of prohibition. This language supplies a clew concerning the understanding of Congress in regard to the conditional prohibition. The purpose of Congress was to extend the federal prohibition of the admission of Negroes to the utmost point permissible under the Constitution. The temporary restraining clause set up a limitation on Congressional power over this subject, governed by the extent to which the states permitted the importation or immigration of Negroes. Congress could prohibit this form of commerce only so far as the states prohibited it also. Hence the statute was framed in terms of reference to state statutes, already enacted or yet to be enacted, because under the Constitution these statutes marked the limit of federal authority over the subject. With the acquisition in 1808 of full power over the matter Congress passed a general prohibitory statute against the importation of African slaves.<sup>8</sup> The 1803 statute was not repealed, however, but remained in force until it was rendered obsolete by the adoption of the Thirteenth Amendment.

The 1803 statute presented some of the issues which were to be raised in connection with later regulations of commerce conditioned upon violation of state laws. In the first place there was the question of the authority of Congress to reach the subject dealt with by any sort of prohibitory statute. If this power was conceded to Congress, there was the further question of the validity of a prohibition of such commerce conditioned upon the existence

<sup>7</sup> The implication of this section of the statute as a federal adoption of state laws is discussed at a later point, *infra*, pp. 356-358.

<sup>8</sup> Act of March 2, 1807, 2 *Stat.* 426. This statute was amended by acts passed in 1818, 1819, and 1820. These federal laws directed against the African slave trade were never enforced very effectively. See Du Bois, *op. cit.*, Chap. VIII and pp. 178 ff.



of prohibitory legislation in the several states. Finally, there was the question of the validity of the state laws to which the federal act made reference, and the effect of that statute in giving them force and validity if they could not be made and enforced by the states in the absence of a federal law implying Congressional approval of them.

The adoption of a federal policy of prohibiting the African slave trade after 1808 independently of state laws obviated for the most part judicial consideration of the legal issues raised by the 1803 statute, even though this law was not expressly repealed. The authority of Congress to prohibit the foreign slave trade after 1808 received judicial support;<sup>9</sup> but the question whether the authority of the states in regulating the interstate and foreign slave trade and Negro immigration in general was coördinate with or subordinate to the power of Congress remained one of the great constitutional controversies in the pre-Civil War period. Indeed, it was this question, more than any other, which prevented the reaching of a settled opinion by the Supreme Court in that period on the broad issue of the exclusiveness of the commerce power.<sup>10</sup> Whether the 1803 statute involved a Congressional recognition of a concurrent authority in the states to regulate the entry of persons of the black race at their ports was never conclusively decided by the courts.<sup>11</sup>

<sup>9</sup> *The Merino*, 9 Wheat. 391 (U. S.) (1824); *United States v. Gooding*, 12 Wheat. 460 (U. S.) (1827); *United States v. Preston*, 3 Pet. 57 (U. S.) (1830)

<sup>10</sup> See Charles Warren, *The Supreme Court in United States History* (1922), II, 81.

<sup>11</sup> In *Gibbons v. Ogden*, 9 Wheat. 1, 206 (U. S.) (1824), Chief Justice Marshall refused to accept the view that by this act Congress recognized a concurrent power in the states over commerce. He pointed out that this statute merely aided any state in the exercise of power retained by it temporarily under the clause limiting Congressional power over the importation or migration of persons.

After the lapse of the restraining clause on Congressional power the question of the extent of the authority of the states to regulate the entry of persons of the black race at their ports gave the courts much trouble until the Civil War. A chief matter of dispute concerned the validity of so-called "colored-seamen" statutes enacted by a number of Southern states, requiring colored members of ships' crews to be detained during the stay of vessels in Southern ports. In *Roberts v. Yates*, 20 F. Cas. 937 (No. 11,919) (Cir. Ct., S. C.) (1853), such a state statute was held valid as a proper exercise of state police power or of a concurrent power over commerce, reliance also being placed upon the 1803 statute of Congress. Colored-seamen statutes were held invalid because of conflict with an exclusive power of Congress over commerce and with the terms of

The validity of the prohibitory section of the 1803 act was judicially examined in a circuit court case decided in 1820. The case arose from a libel against a vessel for an alleged violation of the second section of the act through having entered the port of Norfolk, Virginia, while having aboard three "persons of color." The government also contended that entry was illegal under the terms of the first section of the act, since Virginia had a "colored-seamen" statute prohibiting entry of vessels with Negroes aboard. Chief Justice Marshall, sitting as a member of the circuit court, gave both sections of the federal law his full approbation, but found that under its terms there had been no illegal entry.<sup>12</sup>

The court held it to be within the competence of Congress under the commerce clause to regulate navigation and, as an incident thereto, to control the movement of persons in commerce by vessels.<sup>13</sup> It found, however, that there had been no violation of the second section of the 1803 statute, because the Negroes involved were members of the crew coming within the exemptions of this part of the federal law. Concerning the second point, whether there had been a violation of state law making the penalties of the federal statute applicable, the court made a similar finding. This method of regulation was held to be within Congressional authority. The court refused to concede that by this section Congress had sought to inflict a penalty for the violation of state law. It held that Congress had sought rather to place a limit upon the operation of the penal law of the United States, necessitated by

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commercial treaties in *Elkison v. Delhesseline*, 8 F. Cas. 493 (No. 4,366) (Cir. Ct., S. C.) (1823), *The Cynosure*, 6 F. Cas. 1102 (No. 3,529) (D. C., Mass.) (1844); and *The William Jarvis*, 299 F. Cas. 1309 (No. 17,697) (D. C., Mass.) (1859). A listing of the colored-seamen statutes given in *New York v. Miln*, 11 Pet. 102, 115 (U. S.) (1837), showed seven states with such statutes at that time.

The controversy over these laws was carried to Congress. In 1843 the House Committee on Commerce made an investigation and presented a report in which it was maintained that the South Carolina colored-seamen law was void because of conflict with the guarantee of privileges and immunities in the Fourth Article of the Constitution, the commerce clause, and certain commercial treaties. See *H. Rept.* 80, 27th Cong., 3d Sess. Concerning the claim that the 1803 law sanctioned these laws of the states, the committee report insisted that this provision was a "mere dead letter upon the statute book," even though it had not been repealed formally. *Ibid.*, p. 5

<sup>12</sup> *The Brig Wilson v. United States*, 30 F. Cas. 239 (No. 17,486) (Cir. Ct., Va.) (1820).

<sup>13</sup> *Ibid.*, p. 243. Cf. the opinion of the Chief Justice in *Gibbons v. Ogden*, 9 Wheat. 1 (U. S.) (1824).

the temporary demarcation of federal authority in the Constitution. An analysis of the terms of the Virginia statute disclosed that it did not apply to crew members who departed with the vessel or to "persons of color," that is, to persons having less Negro blood than a mulatto. As it was not shown that there had been a violation of the state statute, the penalties of the first section of the federal statute did not apply.<sup>14</sup>

This favorable holding on the validity of the 1803 statute failed to provide a very sound foundation for an extension of the principle of regulating commerce by the conditional-prohibition approach. In *The Brig Wilson v. United States* there was judicial recognition of the power of Congress to prohibit conditionally. The Court justified such action, however, not on the authority of the federal government to provide penalties for the violation of state laws, but upon the peculiar provisions of the Constitution relative to the power of Congress over the admission of Negroes. The effect of the federal statute in validating the state laws to which it made reference was uncertain by reason of the failure of the courts to agree on the question whether the states possessed power to control the ingress of Negroes under their police authority or their concurrent power to regulate commerce. In this respect the federal law stood in the same light as other acts of Congress having a relation to state control of the interstate slave trade.<sup>15</sup>

<sup>14</sup> *Ibid*, p. 245. The Chief Justice made no attempt to explain the basis upon which the validity of the Virginia statute rested beyond pointing to the restraining clause of the Constitution, which implied a continuance of authority in the states temporarily to control the importation or migration of persons. This would not provide an answer to the question, since the Virginia statute involved was enacted in 1819, after Congress had gained full control over the subject by reason of the lapse of the limitation upon federal authority. It is possible that the Chief Justice would have considered the state statute a valid exercise of the state's police power. In *Gibbons v. Ogden*, 9 Wheat. 1, 206 (U. S.) (1824), Chief Justice Marshall refused to concede that the restraining clause implied a recognition of a concurrent power in the states to regulate commerce, which would bar his holding that the state act rested on this basis. Being familiar with the strongly held views of Southerners, the Chief Justice deliberately avoided taking a stand on the question of the constitutionality of their colored-seamen statutes. See his letter to Justice Story, quoted in Warren, *op cit*, II, 86.

<sup>15</sup> The states legislated freely upon the subject of the interstate movement of Negroes, particularly in respect to the introduction of Negroes for sale. For a digest of these laws see Collins, *op. cit.* In *Groves v. Slaughter*, 15 Pet. 449 (U. S.) (1841), the Supreme Court was presented with an opportunity to rule upon the validity of a Mississippi statute of this character; but the case was

At any rate it established a legislative precedent. Over a century later the 1803 law was cited in Congressional debates as a precedent for the adoption of legislation prohibiting the introduction of intoxicating liquors into states where their sale was prohibited.<sup>16</sup>

The slavery problem gave rise to further controversy concerning the constitutional authority of Congress to legislate with a view to aiding the states in the enforcement of their laws. The issue was one concerning the power of Congress and the states under the postal clause, rather than under the commerce clause, but the general principle of a federal prohibition conditioned upon violation of state law was involved. Aroused by the circulation of abolitionist literature in Southern communities, President Jackson in his annual message to Congress in 1835 recommended enactment of legislation which would prohibit, under severe penalties, the circulation of "incendiary" publications calculated to arouse the slaves to insurrection.<sup>17</sup> A bill was introduced by Senator Calhoun, of South Carolina, to carry out this recommendation. The proposed measure, which came up for debate in the Senate in 1836, would have made it unlawful for a postal official knowingly to deliver any material dealing with the subject of slavery where, by the laws of the state, its circulation was unlawful.

The bill evoked a very spirited debate, touching not only upon the subject of slavery in general, but also upon the respective powers of Congress and the states over exclusion of matter from

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decided without an expression of opinion by the Court on the question, although three members of the Court individually expressed their views upon it. In the argument of counsel the point was stressed that in admitting into the Union various states with constitutions containing clauses empowering their legislatures to regulate the introduction of slaves for sale, Congress had given its approval to state regulation of this subject. A résumé of state legislation and judicial decisions relative to the power of states to control the interstate slave trade was given in a voluminous brief prepared for the state in this case, 15 Pet. (App.), pp. lxxiii-lxxxviii.

<sup>16</sup> See the remarks of Senator Williams, of Mississippi, on the Webb-Kenyon Bill, *Cong. Rec.*, 62d Cong., 3d Sess., p. 703, and of Representative Webb, of North Carolina, *ibid.*, p. 2810, see also *H. Rept.* 1461, 62d Cong., 3d Sess., p. 6. For some reason the 1803 law was described by those referring to it as an act in which Congress prohibited the migration of Negroes from *one state* into another where their entry was prohibited by state law. The same error is made by Lindsay Rogers in referring to this act in *The Postal Power of Congress*, Johns Hopkins University Studies in Historical and Political Science, Ser. XXXIV, No. 2 (1916), p. 127, note 1.

<sup>17</sup> James D. Richardson, *Messages and Papers of the Presidents* (1903), III, 177.

the mails and the validity and expediency of the particular mode of regulation proposed.<sup>18</sup> On the latter point the debate followed much the same lines as later ones upon measures proposing to regulate commerce in a similar fashion.<sup>19</sup> Calhoun's bill failed of passage in the Senate; but eighty years later the Senate faced the same constitutional issue in connection with a proposal by Senator Jones, of Washington, to prevent the circulation of liquor advertising matter in dry states. In that instance a policy of exclusion of matter from the mails, conditioned upon violation of state law, was regarded with more favor by Congress, and was provided for by statute.

## 2. INTOXICATING LIQUORS

THE idea of coordinating federal regulations of commerce with the laws of receiving states was laid aside for a century after the brief initial experiment with it in connection with the slave traffic. Special difficulties attendant upon state regulation of the liquor traffic led to its rediscovery and reapplication. On the question of the degree of restriction which should be placed upon the manufacture, transportation, and sale of intoxicating liquors there were strongly held and widely divergent views in the several states. Just as the country as a whole was not prepared to accept a policy of total prohibition of the African slave trade in 1787, so it was not prepared to accept a policy of absolute prohibition of the interstate liquor traffic when judicial limitation of state power over this subject made the question a national issue in the 1890's.

Early Congressional efforts were directed toward the evolution

<sup>18</sup> 12 *Cong. Debates*, 26-33, 383, 1103-1108, 1136-1153, 1155-1171, 1721-1738. For accounts of the controversy see Thomas Hart Benton, *Thirty Years' View* (1864), I, Chap. CXXXI; Robert E. Cushman, "National Police Power under the Postal Clause of the Constitution," 4 *Minnesota Law Rev.*, 402, 432 (May, 1920); Rogers, *op. cit.*, pp. 103 ff., 136 ff.

<sup>19</sup> Illustrative of opposing views on the validity and feasibility of the conditional-prohibition feature of the measure are the remarks of Senator Buchanan, of Pennsylvania, and Senator Clay, of Kentucky. Senator Buchanan favored the bill because "it was just, it was politic, it was treating those states with a proper degree of respect, to make our laws conform with their laws, and thus to take care that no conflict should arise between our deputy post-masters and their state authorities"; but Senator Clay questioned the authority of Congress to pass laws to carry into effect the laws of the states, because "it was a most prolific authority, and there was no knowing where it was to stop; it would make the legislation of Congress dependent upon the legislation of twenty-four different sovereignties." 12 *Cong. Debates*, pp. 1725, 1729.

of regulative formulas to refer the question back to the states. The enactment of legislation divesting interstate liquor shipments of the protection of the commerce clause, first in the Wilson Act in 1890 and then in the Webb-Kenyon Act of 1913, has already been described. These measures were only partly successful. Within a few years after the passage of the Webb-Kenyon Act, representations were again being made by the prohibition element for the passage of more rigorous federal protective legislation.

A primary source of difficulty for the prohibition states lay in the circulation of liquor advertising matter and the solicitation of sales within their borders by outside concerns. The interstate traffic thus stimulated opened up numerous avenues for violation of local regulations, particularly since many of the states attempted neither to shut off altogether the introduction of liquors for personal use, nor to prohibit their possession in any quantity for that purpose. To deal with the problem of solicitation of sales some states had banned the circulation of liquor advertising matter and had prohibited or strictly regulated the solicitation of sales by agents. Such statutes rested upon a somewhat uncertain constitutional basis because of the resulting interference with interstate commerce and the mails.

The question whether the states might regulate the activities of soliciting agents was partly cleared up in favor of state authority by the decision of the Supreme Court in *Delameter v. South Dakota* in 1907.<sup>20</sup> But state attempts to regulate the solicitation of liquor sales by mail raised new questions of constitutional authority. Some courts adopted the view that state prohibition of the printing and circulation of liquor advertising matter was void because of interference with the mails or imposition of a direct burden upon interstate commerce where interests in different states were involved.<sup>21</sup> Other lower courts, applying broadly the principles announced by the Supreme Court in *Delameter v. South Dakota*, held that the business of solicitation of liquor sales by advertisement or circular, where interstate dealings and the use of the mails were concerned,<sup>22</sup> was subject to state control under the

<sup>20</sup> 205 U. S. 93 (1907), see *supra*, p. 110

<sup>21</sup> *Rose Co. v. State*, 133 Ga. 353, 65 S. E. 770 (1909), *West Virginia v. Adams Express Co.*, 219 F. 331 (D. C., S. D. W. Va.) (1914), reversed, 219 F. 794.

<sup>22</sup> *West Virginia v. Adams Express Co.*, 219 F. 794 (C. C. A., Fourth) (1915); *State v. Davis*, 77 W. Va. 271, 87 S. E. 262 (1915); *State v. Delaye*, 193 Ala. 500,

Wilson Act. Although the weight of these decisions was on the side of state power to prohibit the buying and selling of liquor advertising matter or its deposit in the mails, the states were unable to deal effectively with those advertisers located outside their jurisdiction. They could with some success prohibit the printing and distribution of advertising matter locally, but they were unable to enforce effectively their ban upon newspapers printed outside their borders or upon the outside dealer who advertised by mailed circulars. The demand was therefore made for Congressional legislation barring liquor advertising matter from the mails if destined for delivery in a locality where its circulation was prohibited.

This effort bore fruit in 1917. A bill to prohibit the circulation of liquor advertising matter in prohibition states was introduced by Senator Bankhead, of Alabama, and passed by the Senate on January 11, 1917.<sup>23</sup> The Bankhead Bill provided a heavy penalty for depositing any letter, card, circular, or newspaper containing any liquor advertising matter for delivery in any place where by state law advertising and soliciting of liquor sales were illegal. Favorable committee action was obtained in the House upon a similar bill proposed by Representative Randall, of California.<sup>24</sup> Before either this or the Bankhead Bill came up for consideration in that body affirmative action was taken by both Houses on another proposal incorporating the same subject matter along with other regulative provisions.

Late in the session, when it began to appear doubtful whether the House would act on either of the liquor-advertising bills before it, Senator Jones, of Washington, offered an amendment to a pending postoffice appropriation measure, proposing to incorporate in it the substance of the Bankhead Bill, already passed by the Senate.<sup>25</sup> As the appropriation bill was certain to go back to the House for consideration of any amendments, the effect of this strategy would be to bring the matter before that body for con-

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68 So. 993 (1915); *State v. State Capital Co.*, 24 Okla. 252, 103 Pac. 1021 (1909); *State v. Bass Publishing Co.*, 104 Me. 288, 71 Atl. 894 (1908). State exclusion of liquor advertising matter from the mails was upheld in *Hayner v. State*, 83 Ohio St. 178, 93 N. E. 900 (1910); *Zinn v. State*, 88 Ark. 273, 114 S. W. 227 (1908), and *State v. Holmes*, 68 Wash. 7, 122 Pac. 345 (1912); but in these cases only intrastate circulation was involved.

<sup>23</sup> *Cong. Rec.*, 64th Cong., 2d Sess., pp. 1166-1173.

<sup>24</sup> *H. Rept.* 1275, on H. R. 18986, 64th Cong., 2d Sess.

<sup>25</sup> *Cong. Rec.*, 64th Cong., 2d Sess., p. 3324.

sideration. Recognizing this fact, the antiprohibition element in the Senate put up a hard fight to keep the amendment from being adopted.

Strong objection was made upon the ground that this provision, if enacted into law, would subject newspaper publishers to undue harassment. In a caustic speech Senator Reed, of Missouri, one of the critics of the Jones Amendment, pointed out that the real offender was not the advertiser nor the dealer who sold the liquors to purchasers in dry states, but the local purchasers. He therefore proposed the addition of a clause to the amendment making the prescribed penalties applicable also to anyone who should "order, purchase, or cause intoxicating liquors to be transported in interstate commerce into any State...the laws of which...prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes"; and to any person who should within such state "knowingly purchase, drink, consume, or use any such liquors so transported in interstate commerce."<sup>26</sup>

Although the proposal came from a source which made it suspect as a bit of joker legislation, it was received with favor by most antiliquor senators, no doubt to the surprise of its sponsor.<sup>27</sup> Objection was made to the second part of Senator Reed's amendment, extending the penalties prescribed to consumers of illegally introduced liquors. This was felt by many senators to be beyond the constitutional authority of Congress. With the approval of Senator Reed, this part of his proposal was eliminated. The per-

<sup>26</sup> *Ibid.*, p. 3330. The proposal to prohibit liquor shipments into dry states was not new, bills of this nature having been introduced in Congress as early as 1890. A bill (H. R. 394) to prohibit the shipment of liquors into dry states had been introduced in the previous session by Representative Morrison, of Indiana, but it was buried in committee.

<sup>27</sup> Senator Reed insisted that he offered his amendment in "absolute earnestness" and good faith. His legislative record on the liquor question stamped him as anything but a friend of the prohibition movement, however. Having proposed the amendment, he continued to support it, even though it caused consternation among the lobby maintained by the liquor interests. It is difficult to believe that he did not offer his amendment in a spirit of obstructionism, in order to expose the hypocritical attitude of "professional" drys. He declared that certain Southern members were unwilling to establish absolute prohibition in their states, as evidenced by their insistence on keeping open the channels of interstate commerce for securing liquors for their own personal use. The Reed proposal came immediately after one by Senator Martine, of New Jersey, to extend the principle of the Jones Amendment to tobacco advertising. Senator Martine's amendment was offered, as its sponsor frankly stated, "to test out these [antiliquor] humanitarians." *Ibid.*, pp. 3329, 3330.



fectured Reed Amendment was then added to Senator Jones's original proposal, and the revised amendment attached to the Post Office Appropriation Bill as a rider.<sup>28</sup>

Upon the return of this bill to the House for consideration of the Senate's amendments the question of the acceptance of the Jones-Reed Amendment became a subject of warm debate. Not only were the antiprohibitionists aroused, but also some of the more moderate drys. As the proposal voted by the Senate would shut off importations of liquor into dry states, regardless of their laws permitting a limited importation for personal use, it was objected to as a violation of states' rights under the Tenth Amendment.<sup>29</sup> To liberalize the conditional prohibition, a proposal was offered amending the Senate version to cause the prohibition to apply only in case of introduction of liquors into a state "contrary to its laws." This proposal was rejected.<sup>30</sup> The ultradrys carried the day in triumph, and the amendment, as originally drawn by the Senate, became law on March 3, 1917.<sup>31</sup>

The Jones-Reed Amendment sought to protect the dry states in two ways. First, advertising matter and solicitations for liquor orders were excluded from the mails if addressed to any person or firm in any state which made unlawful the advertisement or solicitation of orders for liquors. A penalty not to exceed a \$1,000 fine or six months' imprisonment, or both, was prescribed for the offense of depositing such forbidden matter in the mails. For a second offense, a prison sentence of not more than one year might be imposed. Secondly, the introduction of intoxicating liquors into any state where their manufacture and sale was prohibited was forbidden under the same penalties. It will be noted that these con-

<sup>28</sup> *Ibid.*, pp. 3335, 3343

<sup>29</sup> See the remarks of Representatives Heflin, of Alabama, and Sherley, of Kentucky, *ibid.*, p. 3796.

<sup>30</sup> *Ibid.*, p. 3793 The proposal was defeated by a vote of 206 to 81.

<sup>31</sup> Act of March 3, 1917, c. 162, sec. 5, 39 *Stat.* 1069. By an act passed the following day (39 *Stat.* 1202), it was made operative on July 1, 1917. The conditional prohibition of commerce in intoxicating liquors read as follows: "Whoever shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any State or Territory, the laws of which State or Territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes, shall be punished as aforesaid: *Provided*, that nothing herein shall authorize the shipment of liquor into any State contrary to the laws of such State...."

ditional prohibitions were not framed in direct reference to the violation of state laws. They were conditioned upon the existence of a *general policy* of restriction of liquor advertising or order solicitation or a *general policy* of restriction of manufacture and sale of liquors by the states of reception.

This careful wording of the Jones-Reed Amendment did much to weaken the attack upon its constitutionality, though affording ground for assailing it as an interference with the reserved powers of the states. Although the law was framed so as to apply to any states which might subsequently adopt regulative policies coming within its terms, it was not phrased in terms of direct reference to specific state laws. It was unnecessary for the states to rely upon this statute as evidence of Congressional consent to their enactment of the laws to which it made indirect reference, as was true under the Webb-Kenyon Act. State power to prohibit the manufacture and sale of liquor locally had been established in judicial decisions even prior to the passage of the Wilson Act in 1890. The question of the constitutionality of the Jones-Reed Amendment turned primarily upon the point of the validity of a federal regulation of interstate commerce conditioned upon varying policies of state regulation of the liquor traffic, rather than upon the violation of specific state statutes.

The constitutionality of that part of the Jones-Reed Amendment excluding liquor advertising matter from the mails was never tested in the courts. Since the measure placed upon federal authorities the burden of enforcing the ban on the introduction of such matter, the states did not find it necessary to establish their authority to pass restrictive laws applying to advertising matter introduced from other states. Whether the federal prohibition could have been construed as extending federal consent to the enforcement of state laws reaching the circulation of advertising matter and order solicitations in the interstate sphere remained unsettled. A construction to this effect might well have been given these provisions of the statute in view of the fact that the Supreme Court had held in the *Clark Distilling Company* case that the prohibition of liquor shipments into a state for the purpose of violating its laws served to subject such shipments to the operation of state laws.

The constitutionality of the Reed Amendment, that is, that part of the statute placing a ban upon shipments of liquor into

dry states, was soon established in a case reaching the Supreme Court. The case involved the transportation of a quart of liquor from Kentucky into the state of West Virginia by the purchaser for his own personal use. Notwithstanding the fact that an introduction of liquor under such circumstances was not prohibited by the laws of West Virginia, the Supreme Court held that the penalties of the statute were applicable.<sup>32</sup> The Court had no difficulty in finding that Congress possessed the power to prohibit the interstate movement of liquors, since that point had already been conceded in the *Clark Distilling Company* case two years earlier. Of greater significance were the questions whether the transportation of one's own goods personally was interstate commerce; whether Congress might condition a federal regulation of commerce upon the existence of a state policy of prohibition of the manufacture and sale of liquors; and whether Congress might impose a more rigorous prohibition of interstate commerce in such goods than the state itself imposed. The answer of the Court in each instance was in the affirmative.

While conceding fully that Congress might exercise its regulatory power over commerce to aid in the enforcement of state policies, the Court emphasized that the commerce power was independent of the powers of the states and was "not to be limited by state laws." Congress was not limited in this instance to the prohibition of only such commerce in liquors as West Virginia made illegal.<sup>33</sup> The outspoken declaration on this point by Justice Day, who gave the opinion of the Court, had particular significance in view of the equivocal pronouncement of the Court in a later decision involving a somewhat similar conditional prohibition of commerce in prison-made goods.<sup>34</sup> There was no intimation here that Congress might prohibit commerce *only in conformity with* state laws.

The dissenting opinion offered by Justices Clarke and McReynolds emphasized this particular issue. The position of the minority was not that the Reed Amendment was invalid per se, but that as construed by the Court, it amounted to a "direct intermeddling

<sup>32</sup> *United States v. Hill*, 248 U. S. 420 (1919), Clarke and McReynolds, JJ., dissenting.

<sup>33</sup> *Ibid.*, pp. 425, 427.

<sup>34</sup> *Kentucky Whip and Collar Co. v. Illinois Central R. R. Co.*, 299 U. S. 334 (1937); see *infra*, pp. 297-299.

with the State's internal affairs," in violation of the states' reserved powers under the Tenth Amendment.<sup>35</sup> The minority opinion maintained that the authority of Congress to prohibit commerce in "legitimate" goods was limited to the condemnation of them only as they had fallen under the ban of state law. This idea was not new, having already been expressed in Congressional debates.<sup>36</sup> It was in line with the Court's decision in *Hammer v. Dagenhart*, upon which the dissenting opinion relied heavily. The minority opinion represented a concrete application of the theory that the reserved powers of the states constitute a limitation upon the exercise of federal powers. The implication was that, if Congress was to exercise any considerable authority in excluding commodities from interstate commercial channels, the conditional-prohibition method of regulation would have to be used. Federal prohibitions of commerce would have to be framed in such a way as not to override state policies.

The constitutionality of the Reed Amendment was attacked on another ground in *United States v. Williams*.<sup>37</sup> In this case the contention was advanced that the federal act was invalid because it was in conflict with the preference clause of the Constitution,<sup>38</sup> since the regulation applied only to the prohibition states. The Court dismissed this contention as wholly unfounded, merely citing in explanation the earlier rulings in the *Hill* and *Clark Distilling Company* cases. The failure of this line of attack upon the Webb-Kenyon Act in the latter case under conditions which even more strongly justified it had, in fact, already settled the issue.<sup>39</sup> *United States v. Williams* gave the *coup de grâce* to the argument that federal regulations of commerce, conditioned upon state policy, were unconstitutional because of violation of the uniformity rule. The contention would seem to have had some merit, especially since in earlier cases the Court in defending its holdings on the exclusiveness of the federal power over commerce had relied heavily upon the argument of necessity for uniformity of regulation.

A number of questions of interpretation were presented by

<sup>35</sup> *United States v. Hill*, 248 U. S. 420, 428 (1919)

<sup>36</sup> See the account of the debates in the Senate on the Wilson and Webb-Kenyon bills, *supra*, pp. 91 ff., 220 ff.

<sup>37</sup> 255 U. S. 336 (1921).

<sup>38</sup> Article I, sec. 9: "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another."

<sup>39</sup> See *supra*, pp. 229, 235-236.

the Reed Amendment, not all of which had been fully cleared up by the time the statute ceased to have any practical importance by reason of the establishment of national prohibition. Following the principles set forth in *United States v. Hill*, the Court held the statute prohibited transportation of liquors by auto for personal use into a prohibition state.<sup>40</sup> The statute was held inapplicable, however, to transportation of liquors into a dry state in the course of transshipment to another state, where introduction was not illegal.<sup>41</sup> In other words, the Reed Amendment was construed to apply only to shipments into a state of ultimate destination, without regard to the laws of states through which shipments might go in the course of delivery. On the point whether the federal law covered shipment of liquors into a state which did not have state-wide prohibition of liquor sales, but permitted localities to forbid sales by local option, decisions indicated that there must be state-wide prohibition for the federal statute to be applicable.<sup>42</sup>

A point of some importance upon which no opinion by the Supreme Court was given concerned the effect of the Reed Amendment upon state authority to control the introduction of liquors

<sup>40</sup> *United States v. Simpson*, 252 U. S. 465 (1920). For a discussion of this aspect of the Reed Amendment see Thomas P. Hardman, "Does the 'Bone-Dry' Law Prohibit the Interstate Transportation of Intoxicants by the Owner for Personal Use?" 25 *West Virginia Law Quart.* 222 (April, 1918), and D. O. McGovney, "The Webb-Kenyon Decision and Beyond," 3 *Iowa Law Bull.* 145 (May, 1917).

<sup>41</sup> *United States v. Gudger*, 249 U. S. 373 (1919); accord, *Berryman v. United States*, 259 F. 208 (C. C. A., Sixth) (1919); *Preyer v. United States*, 260 F. 157 (C. C. A., Fourth) (1919); *Whiting v. United States*, 263 F. 477 (App., D. C.) (1920).

<sup>42</sup> In *Laughter v. United States*, 259 F. 94 (D. C. Tenn.) (1919), certiorari denied, 249 U. S. 613 (1919), it was held that there must exist state-wide prohibition to call the federal provisions into play. The denial of the petition for a review would indicate the Supreme Court's approval of this construction of the law. *United States v. Collins*, 254 F. 869 (D. C., W. D. La.) (1919), was to the same effect; contra, *McAdams v. Wells-Fargo and Co.*, 249 F. 175 (D. C., E. D. La.) (1918).

Another question of a similar character was whether the federal prohibition would apply to the shipment of *all* intoxicating liquors into a state in case a state's laws prohibited the sale of only *some* liquors which were intoxicating in fact, or would exclude only those liquors banned by state law. This question was not involved in any court decisions, but to judge by the attitude taken on related questions, it is probable that the courts would have disregarded any discrimination among different classes of intoxicating liquors by state law in determining whether the federal ban should apply. For a discussion of these and related questions see John K. Graves, "The Reed 'Bone-Dry' Amendment," 4 *Virginia Law Rev.* 634 (May, 1917).

under the Webb-Kenyon Act. A clause in the Reed Amendment expressly disavowed any intention to authorize the shipment of liquors into a state in violation of its laws. This was inserted for the obvious purpose of making clear the intention of Congress to leave undisturbed the arrangement established by the Webb-Kenyon Act in respect to those states to which the Reed Amendment did not apply. But in *United States v. Hill*, the later statute was held to establish an absolute prohibition on the shipment of liquors into a prohibition state, its laws on the subject of introduction of liquors to the contrary notwithstanding. There was thus an incompatibility in the Reed Amendment and the Webb-Kenyon Act so far as the prohibition states were concerned. The later act could be construed as a federal regulation which by implication excluded all action upon the same subject by the states to which it applied.

The Supreme Court of Michigan gave this construction to it in a case arising after the validation of the Reed Amendment by the Supreme Court.<sup>43</sup> Other courts continued to permit the enforcement of state laws regulating the introduction of liquors into states covered by the Reed Amendment.<sup>44</sup> From one point of view the laws of prohibition states regulating liquors might properly have been deemed merely supplementary to the national law on the matter. There would be no conflict between them and the federal statute, so long as no action relating to commerce in intoxicating liquors which was prohibited by state law was not also prohibited by the Reed Amendment. On the other hand to the extent that these state laws purported to authorize the introduction of limited quantities of liquors for personal use, as they commonly did, they were not in harmony with the federal regulation. For this reason they could conceivably have been held to contravene an exercise of power by Congress which excluded all state action on the same subject.

During the era of national prohibition the Reed Amendment remained on the statute books, although it ceased to be of significance in view of the more stringent Volstead Act provisions. Grow-

<sup>43</sup> *People v. Keeley*, 213 Mich. 115, 181 N. W. 990 (1921).

<sup>44</sup> *Sickel v. Commonwealth*, 124 Va. 821, 97 S. E. 783, 99 S. E. 678 (1919), writ of error refused on ground of want of jurisdiction, 254 U. S. 619 (1921); *Ex parte Pratt*, 83 W. Va. 51, 97 S. E. 301 (1918). See the discussion of these cases *supra*, p. 243, note 130.

ing reaction against the policy of strict prohibition led to the adoption of the Beer Act by Congress in the spring of 1933, by which the manufacture and sale of 3.2 per cent beer was legalized in those states which did not provide to the contrary. In this law the Reed Amendment principle was extended by specific provision to beer for the protection of the states which continued to ban its manufacture and sale. The Beer Act<sup>45</sup> also applied the principle of divestment by prohibition to such beer, under the formula originated in the Webb-Kenyon Act.<sup>46</sup> This statute had a short-lived importance owing to the ratification of the Twenty-first Amendment late in the same year. The 1933 statute was repealed in its entirety in 1935.<sup>47</sup>

With the adoption of the Twenty-first Amendment, the system of state option in regulating the liquor traffic was restored. The legalization of this traffic in all but a few of the states<sup>48</sup> created a changed situation, and led to a revision of federal legislation for the protection of dry and semidry states. The incorporation of the second section in the Twenty-first Amendment provided an additional constitutional basis upon which federal protective legislation might be founded.<sup>49</sup> The provisions of this section were generally regarded, however, as designed to preserve freedom of action by the states in dealing with this traffic, rather than to empower and obligate the national government to extend aid to all

<sup>45</sup> Act of March 22, 1933, 48 Stat. 17; 27 *United States Code* (1934), secs. 64a-64j.

<sup>46</sup> In *Richmire v. Legg*, 3 F. Supp. 787 (N. D. Ga.) (1933), it was held that, since the carriage of intoxicating liquors continued to be prohibited by the Eighteenth Amendment, a state might lawfully seize a shipment of 3.2 per cent beer passing through to another state where it could be lawfully received, notwithstanding the fact that Congress had legalized the manufacture, sale, and transportation of such beer for beverage purposes. The court's view was that, so long as the Eighteenth Amendment was in effect, Congress had no authority to impose its own definition of intoxicating liquor upon a state which might desire a more stringent definition. The case illustrated the difficulties which would have followed an attempt to achieve a liberalization of the prohibition regime by a relaxation of national enforcement standards without a repeal of the Eighteenth Amendment.

<sup>47</sup> Act of Aug. 27, 1935, c. 740, sec. 202(a), 49 Stat. 877.

<sup>48</sup> By 1939 all states had legalized the liquor traffic in some form. Kansas and Oklahoma permitted only the sale of 3.2 per cent beer; Mississippi the sale of 4 per cent wine and beer.

<sup>49</sup> Cf. *Arrow Distilleries, Inc. v. Alexander*, 109 F. (2d) 397 (C. C. A., Seventh) (1940); *Hayes v. United States*, 112 F. (2d) 417 (C. C. A., Tenth) (1940).

the states in the enforcement of their laws.<sup>50</sup> Accordingly, no state-aid law of general applicability was enacted.

In 1934 Congress repealed that part of the original Jones-Reed Amendment prohibiting the circulation of liquor advertising matter in states which barred such circulation.<sup>51</sup> There appeared later in the Federal Alcohol Administration Act of 1935 a section<sup>52</sup> placing in the hands of the Federal Alcohol Administrator responsibility for setting up regulations concerning the solicitation of sales by advertising on the part of manufacturers and dealers coming under the general provisions of the act.<sup>53</sup>

The conditional prohibition upon shipment of liquors into dry states embodied in the Reed Amendment was revised by Congress in 1936. The Reed Amendment was repealed. The Liquor Enforcement Act<sup>54</sup> which supplanted it declared the introduction of intoxicating liquors into any state which by its laws prohibits all sales of liquors containing more than 4 per cent alcohol by volume to be a misdemeanor, provided (1) such shipments were not accompanied by a permit for entry required by the state, or (2) that all importations of liquor into the state were prohibited by state law. Continuous transportation of liquors through a dry state was not to be affected by the federal prohibition.

<sup>50</sup> There appears to have been some misunderstanding concerning the meaning of the second section of the Twenty-first Amendment at the time of its adoption. As has been seen, this provision was inserted by the Senate to insure continuance of the policy of divestment embodied in the Webb-Kenyon Act. See *supra*, p. 250. This being true, the amendment provision was self-executing; it protected the states in making and enforcing such laws as they saw fit, regardless of the resulting interference with interstate and foreign commerce. Nevertheless, the view seemed to be entertained in some quarters that the provision implied a policy of federal legislative cooperation with the states in preventing the introduction of liquors in violation of their laws. Thus the chairman of the Idaho convention which considered ratification of the Twenty-first Amendment asserted that the adoption of the repealing amendment would mean that "those who traffic in liquor across state lines which have dry laws may and will be prosecuted in Federal Courts." See Everett S. Brown, *Ratification of the Twenty-first Amendment to the Constitution of the United States: State Convention Records and Laws*, University of Michigan Publications, Law, Vol. VII (1938), p. 104.

<sup>51</sup> Act of June 11, 1934, c. 1, Title I, sec. 12, 48 Stat. 316.

<sup>52</sup> Act of Aug. 29, 1935, c. 814, sec. 5, 49 Stat. 981; 27 U. S. C. A. (1940 Supp.), sec. 205.

<sup>53</sup> Regulations adopted concerning the advertising of malt beverages under this statute are found in 1 F. Reg., Part 2, pp. 2013, 2016.

<sup>54</sup> Act of June 25, 1936, 49 Stat. 1928; 27 U. S. C. A. (1940 Supp.), secs. 221-228.



The objective of the revised act was twofold. It was to protect the "bone-dry" states which prohibited the importation of all intoxicating liquors and also to protect those states legalizing the sale of beverages of less than 4 per cent alcoholic content, providing they set up a permit system for regulating the introduction of such beverages. Until recently, none of the semidry states had enacted legislation bringing into play these Liquor Enforcement Act provisions in respect to it.<sup>55</sup> In 1939 the legislatures of Kansas and Oklahoma revised the liquor-importation laws of those states so as to bring them within the protective range of the federal law.<sup>56</sup> Notwithstanding the fact that the Federal Alcohol Administration Act of 1935 is also designed to aid the states in the enforcement of their liquor laws,<sup>57</sup> the dries in Congress have not been satisfied with federal assistance so far extended to the states. Attempts were made by them in 1937 to secure a broadening of the applicability of the Liquor Enforcement Act. Their efforts were unsuccessful, owing to disagreement between the two houses on the form and scope of the new legislation.<sup>58</sup>

<sup>55</sup> S. Rept. 1872, on H. R. 7508, 75th Cong., 3d Sess. In *Dunn v. United States*, 98 F. (2d) 119 (C. C. A., Tenth) (1938), the penalties of the 1936 act were held inapplicable to shipments of liquors into Oklahoma, because the laws of that state neither provided a permit system for regulating entry nor prohibited all importations of liquors.

<sup>56</sup> *Laws of Kansas, 1939*, c. 179, p. 299; *Session Laws of Oklahoma, 1939*, c. 16. The constitutionality of the revised Oklahoma law and of the Liquor Enforcement Act, which was held applicable under the new state statute, was sustained in *Hayes v. United States*, 112 F. (2d) 417 (C. C. A., Tenth) (1940), and *Hastings v. United States*, 115 F. (2d) 216 (C. C. A., Eighth) (1940).

<sup>57</sup> This statute empowers the Federal Alcohol Administrator to refuse to grant basic permits to manufacturers or dealers if they propose to engage in operations in violation of state law, and to suspend or revoke such permits for violation of the conditions under which they were granted, one condition being compliance with the Twenty-first Amendment. See Act of Aug. 29, 1935, c. 814, sec. 4, 49 Stat. 978; 27 U. S. C. A. (1940 Supp.), sec. 204; see also the comment on this part of the act by Benito Gaguine, "The Federal Alcohol Administration," 7 *George Washington Law Rev.* 844, 977 (May, June, 1939), and by John E. O'Neill, "Federal Activity in Alcoholic Beverage Control," 7 *Law and Contemporary Problems* 570, 574 (Autumn, 1940). The authority of the Federal Alcohol Administrator to suspend the basic permit of a violator of federal and state regulations relating to interstate commerce in liquors was sustained in *Arrow Distilleries, Inc. v. Alexander*, 109 F. (2d) 397 (C. C. A., Seventh) (1940). On July 1, 1940, in accordance with section 2 of Presidential Reorganization Plan No. 3, the Federal Alcohol Administration was abolished and its functions were absorbed by the Alcohol Tax Unit of the Bureau of Internal Revenue.

<sup>58</sup> On June 19, 1937, the House passed a bill introduced by Representative Tarver, of Georgia, which would have revised the 1936 law by making illegal,

During the brief period when it had significance as a regulatory measure the Reed Amendment demonstrated the lengths to which a policy of federal aid to the states under the commerce clause might be carried. The national government assumed the formidable responsibility of excluding liquors from interstate commerce when destined for prohibition states. The practicability of the Reed Amendment had not yet been fully proved when the adoption of the Eighteenth Amendment made it a dead letter. Whether the terms of the Twenty-first Amendment impose an obligation on the national government to continue to assist the prohibition states in preventing the introduction of liquors in violation of their laws is a debatable issue. The inclusion of the section prohibiting the introduction of liquors into a state for delivery or use therein in violation of its laws was for the purpose of constitutionalizing the Webb-Kenyon Act principle, rather than of obligating the national government to take positive steps to protect the states in that regard. The language of this section, however, provides a basis for the adoption of a federal law implementing it.

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under penalty of fine or imprisonment, the introduction of intoxicating liquors into any state "for delivery or use therein in violation of the laws of said State." *Cong. Rec.*, 75th Cong., 1st Sess., pp. 7220, 7227. In reporting the Tarver Bill, the House Judiciary Committee declared its purpose to be the realization of the promise "expressed or implied" when the Twenty-first Amendment was submitted by Congress that protection would be given those states desiring to remain dry. *H. Rept.* 1218, 75th Cong., 1st Sess.

The Senate Judiciary Committee objected to the broad scope of the Tarver Bill, maintaining, with entire justification, that it would bring the federal government into active participation in the enforcement of the liquor laws of all the states, that such an obligation was not imposed upon the federal government by the Twenty-first Amendment; and that the proposed measure would entail the setting up of an enforcement machinery more elaborate than that provided in the prohibition era. *S. Rept.* 1872, 75th Cong., 3d Sess. Having consulted with Department of Justice officials, the Senate Committee recommended the adoption of a substitute for the House bill. This substitute redefined the terms of the 1936 act to make the federal prohibitions applicable to any state which prohibited the sale of intoxicating liquors of more than 5 per cent alcoholic content, provided the importation of such liquors or their transportation within the state was prohibited by state law. The substitute was passed by the Senate, but the House failed to approve the Senate's revision of the original bill. *Cong. Rec.*, 75th Cong., 3d Sess., pp. 10148-10150. Prior to this Senator Lee, of Oklahoma, had offered an amendment to the Revenue Bill of 1938, incorporating in it provisions similar to those of the Senate substitute for the Tarver Bill. His amendment was adopted by the Senate, but it was objected to by House conferees as irrelevant. It was eliminated with the understanding that the matter would be dealt with in a separate measure. *Ibid.*, pp. 5044-5050, 6608, 7709-7711.

The adoption of protective federal legislation following the conditional-prohibition approach has therefore come to be a question of the extent to which the federal government shall implement the constitutional provision on the subject, rather than a question of the use of the commerce power to support state policy. As such the issue is whether Congress shall adopt a measure which extends aid only to the dry or semidry states, or one which extends aid to all states. In view of the reaction against the exercise of federal police authority represented in the repeal of the Eighteenth Amendment it may well be questioned whether Congress should consider itself obligated to reinforce state laws generally by the enactment of a federal statute penalizing interstate shipment of liquors intended to be disposed of in violation of state laws.

All states now legalize the sale of intoxicating beverages in some form. If federal assistance is necessary to secure compliance with state laws regulating the introduction of liquors from other states, it should in fairness be extended to all states on an impartial basis. Federal aid should not be available only to those which, by attempting to pursue a policy of strict regulation not supported by adequate enforcement measures and a strong local public opinion, make federal support necessary.<sup>59</sup> A "wet" state which is attempting to control the liquor traffic by channelizing imports through a state-store system or a system of licensed dealers has as good a claim for federal assistance in enforcing its regulatory laws as does a dry or a semidry state. It should be observed also that thirty of the forty-five states which permit the sale of alcoholic liquors have adopted the local-option system of control. Many of these thirty states contain important dry areas.<sup>60</sup> If it is too large an undertaking for the federal government to attempt to prevent

<sup>59</sup> Gaguine, *op. cit.*, p. 979, observes: "The dry states, although uniformly asking for Federal protection, in effect permitted and even encouraged illicit liquor traffic to thrive within their own borders to such an extent that city governments, in one state, issued permits to engage in the liquor business explicitly prohibited by state law. It is naturally difficult for the Federal government to protect such states, when no cooperation is extended by the states themselves."

<sup>60</sup> Jack E. Thomas and Dorothy C. Culver, "Protection of Dry Areas," 7 *Law and Contemporary Problems* 696-697 (Autumn, 1940). According to these authorities one sixth of the population of the nation lives in dry areas, and in eight of the states which have local option twenty-five per cent or more of the population resides in areas which prohibit the sale of liquor.

the introduction of liquors for illegal purposes into all the states, then the matter should be left entirely in the hands of the states. The would-be dry states have no special claims on the federal government for aid in the enforcement of their laws.

### 3. PRISON-MADE GOODS

THE state-aid system of regulating commerce reached its apogee in the passage of the Ashurst-Sumners Act in 1935.<sup>61</sup> By this law Congress prohibited the introduction of prison-made goods into any state if they were to be received, possessed, sold, or used in violation of the laws of such state. This piece of legislation was rushed through Congress in response to the demands of the same pressure groups which had been instrumental in securing the adoption of the Hawes-Cooper Act in 1929. The operation of the Hawes-Cooper Act had been deferred for a period of five years in order to enable the states to adjust their prison employment policies accordingly. As this period of grace came to a close, it was discovered that a number of states had not abandoned the contract and piece-price systems of prison employment, and were giving every evidence of an intent to continue to seek a market for the products of their prison labor in other states.

Doubt existed concerning the feasibility, as well as the constitutionality, of an absolute federal prohibition of interstate commerce in prison-made goods. In this situation Congress was importuned by free labor and industrial interests to enact legislation that would prevent the introduction of such goods into those states which had banned their sale on the open market. Companion bills dealing with the matter were introduced by Senator Ashurst, of Arizona, and Representative Sumners, of Texas, in 1935, and favorable committee action was quickly obtained on each one. The Senate took up the Ashurst Bill immediately. After only a brief explanation it was passed under unanimous-consent procedure.<sup>62</sup> Three weeks later it was passed by the House under suspension of the rules, in similar rapid order.<sup>63</sup> It became effective as law on July 24, 1935.

The first section of the statute made unlawful the transporta-

<sup>61</sup> Act of July 24, 1935, 49 *Stat.* 494; 49 *U. S. C. A.* (1940 Supp.), secs 61-64.

<sup>62</sup> *Cong. Rec.*, 74th Cong., 1st Sess., p. 10063. <sup>63</sup> *Ibid.*, p. 11191.

tion of goods manufactured, produced, or mined wholly or in part by convict labor into any state when they were intended to be "received, possessed, sold or in any manner used in violation of state law." Goods manufactured in federal penal institutions for the use of the national government were exempted from this prohibition. A second section required the marking of all packages of prison-made goods shipped in interstate commerce to show their prison origin. A penalty of a maximum fine of \$1,000 and forfeiture of the goods involved was fixed for violation of either of these sections.

Considering the importance of the constitutional issues involved, the Ashurst-Sumners Act received less attention in Congress than it deserved. There seems to have been a confusion of thought regarding the nature of the statute and the precedents supporting it. The Senate Judiciary Committee's report on the Ashurst Bill dealt chiefly with the evils of the prison-made-goods traffic and the need for the legislation proposed. On the question of constitutionality the report stated briefly that "the principle involved in this bill has been frequently sustained by the Supreme Court" and that the members of the Committee believed "beyond peradventure of a doubt" that the proposal was constitutional.<sup>64</sup> The House Labor Committee's report on the Sumners Bill did not even discuss the constitutional issue. It merely stated that "the present bill as to intent is similar to the Webb-Kenyon Act of March 1, 1913, and the 'Hot Oil' Act of February 22, 1935, which was passed with the intention of giving Federal enforcement aid to the States in the protection of their sovereignty, after they had enacted legislation, without interference by the commerce clause."<sup>65</sup> Representative Connery, of Massachusetts, in answer to a question concerning the nature of the bill, described it as "providing a penalty to enforce the Hawes-Cooper Act."<sup>66</sup>

None of these descriptions or explanations properly applied to the measure. It obviously was not a proposal to "enforce" the Hawes-Cooper Act. That statute divested original-package shipments of the protection of the federal commerce power. It permitted state power to operate in a hitherto forbidden way. Providing a penalty to enforce such an act would have been a meaningless

<sup>64</sup> *S. Rept.* 906, 74th Cong., 1st Sess., p. 1.

<sup>65</sup> *H. Rept.* 920, 74th Cong., 1st Sess., p. 1.

<sup>66</sup> *Cong. Rec.*, 74th Cong., 1st Sess., p. 11191.

gesture. Nor were the House and Senate committees correct in their assumptions concerning the principle involved and the judicial attitude thereon. No legislation embodying the particular mode of regulation proposed had ever been considered by the Court. The nearest approaches to it had been the Reed Amendment of 1917 and the slave-trade statute of 1803. As has been seen, the applicability of the Reed Amendment was conditioned upon the existence of a *general state policy* of prohibition of the manufacture or sale of liquors. It was not conditioned upon intent to violate the laws of the receiving state respecting reception, sale, possession, and use, as provided in the Ashurst-Sumners Act.

The Webb-Kenyon Act was not a clear precedent. Its language was similar to that of the Ashurst-Sumners Act in defining the terms of the federal prohibition; but the Webb-Kenyon Act was solely a divestment measure. It did not include a penalty to enforce a violation of its prohibitions. This the Ashurst-Sumners Act did have, and this made it a conditional-prohibition enactment, rather than a divestment measure. When a proposal was made to insert a penalty clause in the Webb-Kenyon Bill while it was under consideration in the House, the proposal had been rejected largely because of doubt concerning the constitutionality of such a provision.<sup>67</sup> The Ashurst-Sumners Act was a Webb-Kenyon law for interstate commerce in prison-made goods, with a penalty clause attached to enforce the federal prohibition. It was an innovation in federal regulation of commerce.

The constitutionality of the Ashurst-Sumners Act was a very debatable point, owing particularly to the Court's declarations in two previous cases. In the *First Child Labor Case*<sup>68</sup> the Court had overthrown a Congressional statute prohibiting interstate commerce in goods manufactured with the assistance of child labor, on the ground that the measure sought to regulate manufacturing and thus constituted an invasion of the reserved powers of the states. The Court had on that occasion pointed out that in previous in-

<sup>67</sup> See *supra*, p. 212. It should be noted also that in 1914, during consideration of a prison-made-goods divestment bill in the House, an attempt on the part of Representative Mann, of Illinois, to bring about the adoption of a conditional-prohibition measure similar in general principle to the Ashurst-Sumners Act was defeated by a vote of 216 to 78. *Cong. Rec.*, 63d Cong., 2d Sess., pp. 4300-4301; see *supra*, p. 160.

<sup>68</sup> *Hammer v. Dagenhart*, 247 U. S. 251 (1918).

stances where it had sustained federal authority to prohibit interstate commerce, the goods in question were of such character that their reception and use in the state of destination were inimical to the public interest. Congress had therefore been justified in excluding them from interstate commerce. But in the case of child-labor goods, this was not so; goods thus produced were not harmful per se. The Court had concluded that the real purpose of Congress in passing the prohibitory statute was to bring production under federal control. This was a matter purely local in its character, one over which no authority had been conferred to Congress in the grant of the power to regulate commerce.<sup>69</sup>

It might be easily inferred from these declarations that Congressional prohibition of interstate commerce in prison-made goods, likewise innocent in character, would also be held to be an unconstitutional interference with the authority of the states over a matter lying within the scope of their reserved powers, viz., the management of their penal institutions. This inference was strengthened by the fact that employment of prisoners in gainful occupations was not only desirable for reasons of public economy, but also because of its rehabilitating and disciplinary effects upon the prison workers themselves. If Congressional prohibition of interstate commerce in child-labor goods was unconstitutional as an invasion of the reserved powers of the states, then a federal prohibition of commerce in prison-made goods, tending to derange a state's prison-management methods, was also unconstitutional.

Again, the Ashurst-Sumners Act seemed to run counter to a broad and fundamental principle respecting federal-state relations which the Court had endorsed a short time previously in *United States v. Constantine*.<sup>70</sup> This was a case involving the validity of a provision of the Revenue Act of 1926<sup>71</sup> imposing in addition to a \$25 excise tax upon retail liquor dealers a "special excise tax" of \$1,000 upon them in case they carried on their business contrary to the laws of the state wherein they were located. Justice Roberts, speaking for the Court, held the special excise tax to be a penalty imposed for violating a state law, and not a bona fide tax. A very strong declaration on the point of the authority of Congress to give additional sanction to the criminal statutes of a state

<sup>69</sup> *Ibid.*, pp. 275-276.

<sup>70</sup> 296 U. S. 287 (1935).

<sup>71</sup> 44 Stat 9, 95. The provision had been repealed when the Supreme Court's ruling was made.

by imposing a penalty for their violation was given by the Court. In sweeping language the Court denied that Congress might use a delegated power to effectuate a policy which a state alone was competent to adopt. The Court used the following language:

We think the suggestion has never been made—certainly never entertained by this Court—that the United States may impose cumulative penalties above and beyond those specified by State law for infractions of the State's criminal code by its own citizens. The affirmation of such a proposition would obliterate the distinction between the delegated powers of the federal government and those reserved to the States and to their citizens. The implications from a decision sustaining such an imposition would be startling. The concession of such a power would open the door to unlimited regulation of matters of state concern by federal authority. The regulation of the conduct of its own citizens belongs to the State, not to the United States. The right to impose sanctions for violations of the State's laws inheres in the body of its citizens speaking through their representatives.<sup>72</sup>

Although the Court was dealing in this instance with an attempted exercise of the federal taxing power, there was no indication by it that the general principle enunciated did not apply equally to any other power of Congress.<sup>73</sup>

If the general principle enunciated in *United States v. Constantine* was applicable in the regulation of commerce, the Ashurst-Sumners Act was unconstitutional. Its penalties applied where there was a shipment of prison-made goods into a state with an intent to violate the laws thereof. Although the federal penalty was based upon an *intent* to violate state laws, rather than a consummated violation of them, it did not appear that a distinction could be made on this basis to save the act from condemnation under the principle set forth in *United States v. Constantine*. The Ashurst-Sumners Act unquestionably applied the "startling" doctrine condemned by the Court. The federal government was

<sup>72</sup> 296 U. S. 287, 296. Justice Cardozo, with whom Brandeis and Stone, JJ., concurred, offered a dissenting opinion, contending that the measure was valid as a reasonable classification of occupations for the purpose of taxation.

<sup>73</sup> On the basis of the Supreme Court's ruling in *Ex parte Siebold*, 100 U. S. 371 (1879), an exception to this general principle would appear to have been recognized in respect to matters such as Congressional elections, over which the state and federal governments have concurrent power of regulation. Enforcement of the prohibitory provision in the Twenty-first Amendment regarding liquor importations into a state also constitutes an exception to the general principle set forth in the *Constantine* case. Cf. *Hayes v. United States*, 112 F. (2d) 417, 422 (C. C. A., Tenth) (1940).



assuming to impose sanctions for the violation of state laws dealing with matters which the federal power might not reach.

A test case was immediately brought in the federal courts to settle the constitutional issues involved in the Ashurst-Sumners Act. Pending the decision of the Supreme Court, no vigorous attempt was made by federal authorities to enforce it. In conformity with the federal statute, the Illinois Central Railroad Company's agents refused to accept certain consignments of goods tendered for shipment to other states by the Kentucky Whip and Collar Company, a concern which employed Kentucky prison labor in the manufacture of its products. The tendered shipments were consigned in part to states where the sale of such goods was prohibited, in part to states where such goods were required to be labeled to show their prison origin, and in part to states having no laws restricting the sale of prison-made goods on the open market. None of the packages was labeled in accordance with the Ashurst-Sumners Act requirements.

An injunction was sought by the Kentucky concern to compel acceptance of the tenders. Its counsel insisted that the federal law upon which the railroad company relied was unconstitutional as (1) an unauthorized exercise of the commerce power by Congress, under the principles laid down by the Court in *Hammer v. Dagenhart*; (2) a delegation of power to the states to regulate interstate commerce; and (3) a violation of the guarantee of due process in the Fifth Amendment, by reason of the imposition of an unreasonable demand upon the shipper that he be acquainted with the local laws of all the states to which shipments might be sent. Not only was the conditional-prohibition feature of the act questioned, but also the provision requiring, without regard to state laws, the labeling of all shipments of prison-made goods to show their prison origin.

The district court's ruling was that both Congress and the states were powerless to prohibit interstate commerce in prison-made goods. It conceded, however, that Congress might regulate their shipment in interstate commerce by requiring them to be labeled in the manner specified. As the manufacturing company had failed to comply with this valid part of the federal statute, the railroad company was held to be justified in refusing shipment. The injunction was therefore denied.<sup>74</sup> The Court of Appeals

<sup>74</sup> *Kentucky Whip and Collar Co. v. Illinois Central R. R. Co.*, 12 F. Supp. 37 (W. D. Ky.) (1935).

affirmed this ruling, but differed from the lower court by holding the federal act constitutional in its entirety.<sup>75</sup> The Supreme Court affirmed these rulings, adopting the same view as the Court of Appeals on the constitutionality of the Ashurst-Sumners Act.<sup>76</sup>

The opinion of the Court, written by Chief Justice Hughes, was most carefully phrased. No more authority was conceded to Congress than was absolutely necessary to sustain the measure under consideration. The power of Congress to prohibit interstate commerce in prison-made goods was upheld, provided the goods were to be introduced into a state with the intent to violate its laws. As a reasonable regulation to secure enforcement of this prohibition Congress might require that all packages of prison-made goods shipped in interstate commerce be labeled to show their origin. The Court neither affirmed nor denied the authority of Congress to prohibit or regulate interstate commerce in prison-made goods without reference to state laws.<sup>77</sup> It made no effort to distinguish the issues in the case at hand from those in *Hammer v. Dagenhart*.<sup>78</sup> It made no reference to *United States v. Constantine*.

The Court rested its finding on the validity of the Ashurst-Sumners Act in very great measure upon the *Clark Distilling Company* decision, sustaining the Webb-Kenyon Act. Its view on the relationship of the two acts was stated in the following language:

The Ashurst-Sumners Act as to interstate transportation of convict-made goods has substantially the same provisions as the Webb-Kenyon Act as to intoxicating liquors and finds support in similar considerations. The subject of the prohibited traffic is different, the effects of the traffic are different, *but the underlying principle is the same*. The pertinent point is that where the subject of commerce is one as to which the power of the State may constitutionally be exerted by restriction or prohibition in order to prevent harmful consequences, the Congress may, if it sees fit, put forth

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<sup>75</sup> *Ibid.*, 84 F. (2d) 168 (C. C. A., Sixth) (1936).

<sup>76</sup> *Ibid.*, 299 U. S. 334 (1937).

<sup>77</sup> A statement made at p. 352 in the opinion might be construed as an indication that the Court would hold valid a prohibition of commerce in prison-made goods not conditioned upon a violation of state law. It there stated that "Congress has exercised its *plenary power*, which is subject to no other limitation than that which is found in the Constitution itself." (*Italics mine*)

<sup>78</sup> The only reference to that case was made in pointing out that the invalidation of the Child Labor Act had been held not to involve a denial of power in Congress to regulate commerce in intoxicating liquors according to the method provided in the Wilson and Webb-Kenyon acts. *Ibid.*, p. 350.

its power to regulate interstate commerce so as to prevent that commerce from being used to impede the carrying out of the state policy.<sup>79</sup>

This statement warrants careful analysis. The Court seems to have assumed that these two acts were essentially similar, when in fact they differed in a most fundamental sense. Their resemblance was superficial, rather than fundamental. Though the same language was employed in the two acts to set up a prohibition of commerce contingent upon an intent to violate the laws of a destination state, the enforcement of penalties came in the one instance solely from the state and in the other from the federal government. Whereas the purpose and effect of the Webb-Kenyon Act was to release the powers of destination states and permit them to apply their laws to interstate shipments at the moment of entry into the state, the purpose and effect of the Ashurst-Sumners Act was to call into play an active federal prohibition operating at any point in the interstate movement of goods. The two acts may have been of the same *genus*; but they certainly were not of the same *species*.

On the question whether Congress might prohibit in outright fashion the shipment of prison-made goods in interstate commerce, the Court was noncommittal. In the *Clark Distilling Company* opinion much had been made of the point that, since Congress admittedly possessed the power to prohibit *all* interstate commerce in intoxicating liquors, it could prohibit that commerce in the *partial degree* provided in the Webb-Kenyon Act. The reticence of the Court in conceding a similar all-embracing prohibitory power here to justify holding a partial prohibition valid was no doubt due largely to the difficulty of reconciling such a view with that which had been adopted in *Hammer v. Dagenhart*.

Two constructions might possibly be placed upon the unwillingness of the Court to make a forthright declaration on this point. The Court may have recognized the incompatibility of its ruling in this case with *Hammer v. Dagenhart*, but, unwilling to take the step of immediate reversal of that ruling, it may have been content with merely clearing the way for a retreat from its earlier position at some later date, when the question should be presented in direct fashion.<sup>80</sup> On the other hand, the Court may

<sup>79</sup> *Ibid.*, p. 351. Italics mine.

<sup>80</sup> The opinion that the *Kentucky Whip and Collar* ruling necessarily sounded the doom of the principle applied in *Hammer v. Dagenhart* is offered by Ed-

have been intent upon developing a new principle in the delimitation of the respective spheres of power of the nation and the states. It may have meant to hold that, while Congress may not prohibit interstate commerce in prison-made goods independently of state policy, it may under the peculiar relationships of the federal system prohibit that commerce when carried on for the purpose of violating the laws of destination states. This concession of authority would not require an absolute rejection of the principle of the *First Child Labor Case*, but it would probably necessitate recognition of the power of Congress to prohibit conditionally commerce in child-made goods as well as in prison-made goods.<sup>81</sup>

Whatever may have been the thought of the Court on the point of the authority of Congress to prohibit the interstate shipment of prison-made goods without reference to state laws, it is clear that it meant to give a clean bill of health to the conditional-prohibition method of regulation so far as considerations arising out of the federal division of powers were concerned. The answer made by the Court to the contention of the plaintiff that the act constituted a delegation of power to the states was contained in a brief passage near the conclusion of the opinion. After denying that there was a violation of the guarantee of due process by the federal act, the Court went on to say:

. . . Nor has Congress attempted to delegate its authority to the States. The Congress has not sought to exercise a power not granted or to usurp

ward S. Corwin, "National-State Cooperation—Its Present Possibilities," 46 *Yale Law J.* 599, 614 (Feb., 1937), J. A. C. Grant, "State Power to Prohibit Interstate Commerce," 26 *California Law Rev.* 34, 68 (Nov., 1937), and Hugh E. Willis, "Gibbons v. Ogden, Then and Now," 28 *Kentucky Law J.* 280, 299 (March, 1940). See also the note in 13 *New York University Law Quart. Rev.* 287 (Jan., 1936).

In *United States v. Darby Lumber Co.*, 312 U. S. 100, 116 (1941), the Court stated: "The conclusion is inescapable that *Hammer v. Dagenhart* was a departure from the principles which have prevailed in the interpretation of the commerce clause both before and since the decision and that such vitality, as a precedent, as it then had has long since been exhausted. It should be and is now overruled." The *Kentucky Whip and Collar* case was cited among many others as being inconsistent with the principles applied in *Hammer v. Dagenhart*.

<sup>81</sup> A possible barrier to extension of this method of regulation to child-labor goods might be found by the courts in the guarantee of due process if the laws of the states which a federal conditional prohibition sought to enforce were exceedingly varied. The bearing of the ruling in the *Kentucky Whip and Collar* case on the possibility of regulating commerce in child-made goods, either by direct prohibition or by conditional prohibition, was widely noted in case comments. Action taken by Congress in this regard is described *infra*, pp. 336-339.

the police powers of the States. It has not acted on any assumption of power enlarged by virtue of State action. The Congress has exercised its plenary power, which is subject to no other limitation than that which is found in the Constitution itself. The Congress has formulated its own policy and established its own rule. The fact that it has adopted its rules in order to aid in the enforcement of valid state laws affords no ground for constitutional objection.<sup>82</sup>

Considerations which had led the Court two years earlier to deny to Congress the power to use its taxing authority to aid in the enforcement of state laws appear by this declaration to have no force in limiting Congress in the use of the commerce power. Congress may give an added sanction to state laws by adapting federal commercial regulations to that end. Unquestionably the way was cleared for the extension of this plan of control to other subjects of commerce if Congress should choose to employ it.

A question which was implicit in this endorsement of the conditional-prohibition method of regulation was whether the federal statute had any force to validate state laws to which it made reference. The prohibitory clause of the Ashurst-Sumners Act follows closely the language of the Webb-Kenyon Act. Shipments are prohibited when any person interested therein intends them to be "received, possessed, sold or in any manner used" in violation of state law. It has been seen that the similarly worded Webb-Kenyon Act was construed to validate state laws regulating the reception of liquors in interstate commerce, when such state laws were invalid in the absence of the federal prohibition.<sup>83</sup> Will the Court consider state statutes, otherwise invalid as interfering with interstate commerce, to be valid by reason of the terms of prohibition in the Ashurst-Sumners Act? In other words, does this law have the same effect as the Webb-Kenyon Act in divesting goods of the protection of the commerce clause, so that the states may regulate their introduction? If so, may a state prohibit the importation of prison-made goods from other states while permitting the sale of its own goods in the open market? May it prohibit or limit the importation and sale of some prison-made goods, while permitting other imported prison-made products to be sold freely in its markets?

<sup>82</sup> *Kentucky Whip and Collar Co. v. Illinois Central R. R. Co.*, 299 U. S. 334, 352 (1937).

<sup>83</sup> *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U. S. 311 (1917), *supra*, p. 228.

These are not academic questions, for existing laws of the states present them in concrete form. A survey made in 1937<sup>84</sup> showed that thirty-three states at that time had statutes prohibiting absolutely or regulating in some manner the sale of prison-made goods on the open market. Of these states fifteen made exemptions in certain cases, in some instances clearly discriminating in favor of local prison products.<sup>85</sup> Moreover, several states banned absolutely the sale of imported prison-made goods, but permitted the open-market sale of locally produced prison-made goods.<sup>86</sup> The Supreme Court professed to see no fatal shortcoming in the Ashurst-Sumners Act in the fact that it was adopted with the purpose of aiding in the enforcement of "valid" state laws.<sup>87</sup> The Webb-Kenyon Act was held to authorize state laws invalid in the absence of the federal act; and in the constitutionalized version of that act the states have been held to be completely freed from any inhibitions of the commerce clause in dealing with interstate commerce in intoxicating liquors.<sup>88</sup> By the same train of logic, it would seem that all inhibitions upon a destination state in dealing with prison-made goods arising from the commerce clause have been removed by the Ashurst-Sumners Act. Such commerce has lost the protection arising from its "interstate commercial character" no less than has commerce in intoxicating liquors. If discrimination is permissible in the one case, it should be held equally permissible in the other, for the same divestment formula has been employed in both instances.<sup>89</sup>

<sup>84</sup> Prison Industries Reorganization Administration, *Chart and Comment on Laws Affecting the Labor of Prisoners and the Sale and Distribution of Prison-made Products in the United States*, Bulletin No. 1 (1938).

<sup>85</sup> Common exemptions were those in favor of the products of prison farms and of articles produced by prisoners in their leisure time and sold by them individually. California, Connecticut, Georgia, Massachusetts, and Nebraska had state-use systems of employment, but permitted the sale of surplus articles to the public. Since these states barred open-market sales generally, the exceptions tended to operate as discriminations in favor of the states' own prisons.

<sup>86</sup> Maine, Indiana, and New Jersey had statutes of this character.

<sup>87</sup> *Kentucky Whip and Collar Co. v. Illinois Central R. R. Co.*, 299 U. S. 334, 352 (1937).

<sup>88</sup> *State Board of Equalization v. Youngs' Market Co.*, 299 U. S. 59 (1936).

<sup>89</sup> According to the statement of Howard B. Gill, a prison administrator of repute, given in 1936 in hearings on a bill to revise the Ashurst-Sumners Act, authorities of states having laws restricting the sale of only imported prison-made goods do not consider them enforceable. See *Hearings on S. 4286*, 74th Cong., 2d Sess., Subcommittee of the Senate Judiciary Committee, May 29 and June 2, 1936, p. 36.

Although the Ashurst-Sumners Act, in conjunction with the Hawes-Cooper Act, had a marked effect in forcing states to abandon the use of prison labor in production for the open market,<sup>90</sup> there were at the end of 1937 fifteen states which had not established laws prohibiting or regulating the sale of prison-made goods. Many prison administrators remained hostile to governmental attempts to restrict the sale of such goods on the open market. Meanwhile, the advocates of restriction were not satisfied with the way the Ashurst-Sumners law was operating. "Bootlegging" of prison-made goods in the states of restricted sale appeared.<sup>91</sup> Accordingly, continual pressure was exerted upon Congress for a more drastic statute on the subject of interstate transportation of such goods.

During 1936 an unsuccessful effort was made in Congress to revise the labeling provisions of the Ashurst-Sumners Act by re-

<sup>90</sup> Prior to the passage of the Hawes-Cooper and Ashurst-Sumners acts approximately two-thirds of all the goods produced by prison labor entered into interstate commerce. *Prison Labor in the United States—1932*, Bureau of Labor Statistics, Bulletin No. 595 (1933), p. 31. The readjustments necessitated in state prison-employment policies were not due wholly to the contraction of the interstate market induced by the Hawes-Cooper and Ashurst-Sumners acts. The National Recovery Act codes set up in 1933 and 1934 contained in many instances clauses abolishing or restricting trade in articles produced by prison labor. Complaints on the one hand by certain manufacturers, particularly in the cotton-goods industry, that they were unable to comply with the terms of their NRA codes on hours and wages because of competition from prison plants, and on the other hand by prison administrators, who disclosed that only about twenty-five per cent of the prisoners in state institutions were being productively employed owing to restriction of the market for prison goods, led President Roosevelt in 1934 to direct the National Recovery Board to appoint a commission to study the problem. The upshot of this study was an executive order on September 26, 1935, creating a five-member body known as the Prison Labor Reorganization Administration to conduct surveys and advise the states on how to manage their prison industries so as to avoid competition with free industry. This agency was also to advise the President on the planning of unemployment relief projects in furtherance of state programs of prison-labor readjustment. It has been quite active in making surveys to assist states in developing the state-use system of prison employment. By October, 1937, it had conducted or arranged for surveys in some twenty states and the District of Columbia. See Prison Industries Reorganization Administration, *Progress Report* (1937).

<sup>91</sup> According to A. P. Frierson, chairman of the Tennessee Commission on Prison Competition, in testimony before the Senate Judiciary Committee in 1936, the Ashurst-Sumners Act had proved to be "wholly ineffectual" because it was easy to mingle prison-made goods with similar goods made by free labor and offer them for sale on the open market in states of restricted sale. *Hearings on S. 4286*, 74th Cong., 2d Sess., Subcommittee of the Senate Judiciary Committee, May 29 and June 2, 1936, pp. 2-3.

quiring that all goods of prison manufacture be indelibly branded to show their prison origin, rather than that merely the packages in which they are shipped be so marked.<sup>92</sup> The passage of the Fair Labor Standards Act of 1938 with provisions included in it directly challenging the principle of *Hammer v. Dagenhart* gave impetus to a successful movement for federal legislation prohibiting the shipment of prison-made goods in interstate commerce without reference to state laws. One of the sanctions for enforcement of the maximum-hours and minimum-wage provisions of the Fair Labor Standards Act is the exclusion from interstate commerce of goods produced under proscribed labor standards. Furthermore, the shipment of all goods produced in factories in which children under sixteen years of age are employed is forbidden in interstate commerce.<sup>93</sup>

During consideration of the Fair Labor Standards Bill in Congress efforts were made to attach amendments to it which would have barred prison-made goods from interstate commerce. Although these efforts failed, the campaign for enactment of a federal law prohibiting interstate commerce in such goods was carried to a successful conclusion during the next Congress. A bill sponsored jointly by Senator Ashurst, of Arizona, and Representative Sumners, of Texas, was passed by Congress and was signed by the President on October 14, 1940.<sup>94</sup> This Second Ashurst-Sumners Act prohibited, under penalty of a fine of \$1,000 or imprisonment for one year, or both, the "knowing" transportation in interstate commerce of goods produced by prison labor. Goods produced in federal and District of Columbia prisons for the use of the United States Government, goods produced by any state for the use of

<sup>92</sup> Companion bills to require each article of prison manufacture shipped in interstate commerce to be "plainly and indelibly marked with the words 'prison-made,' together with the name and location of the penal or reformatory institution wherein produced" were introduced in 1936 by Senator Davis, of Pennsylvania, and Representative Robsion, of Kentucky. The Ashurst-Sumners Act requires only that containers or packages in which such goods are shipped be so marked. The Robsion Bill (H R 11372) was passed by the House on June 1, 1936 *Cong. Rec.*, 74th Cong., 2d Sess., p. 8601. The Senate Judiciary Committee failed to report either the Robsion Bill or the similar Davis Bill after it had conducted hearings on them.

<sup>93</sup> See c 676, secs. 6, 7, 12, 15, 52 *Stat* 1062-1063, 1067-1068, 29 *U. S. C. A.* (1940 Supp.), secs. 206, 207, 212, 215. The Fair Labor Standards Act did not prohibit commerce in prison-made goods, although attempts were made in Congress to include such a clause

<sup>94</sup> *Public*, No. 851, 76th Cong., 3d Sess.



other state governments or their local subdivisions, agricultural commodities, and parts for the repair of farm machinery were all exempted from the operation of the law. By its terms, the statute became operative one year after its signature by the President.

There was little discussion of the constitutionality of the proposal in Congress, debate arising chiefly on the extent to which exemptions from the operation of the law should be made in favor of those states which have built up an extensive prison industry in the production of binder twine and farm machinery.<sup>95</sup> The conclusion appears warranted that members of the national legislative body had ceased to doubt the existence of federal power to prohibit, independently of state policy, interstate commerce in goods of prison manufacture. The decisions of the Supreme Court in *Whitfield v. Ohio* and *Kentucky Whip and Collar Company v. Illinois Central Railroad Company* were deemed by them to be controlling on the question. In giving approval to divestment and conditional-prohibition legislation relating to commerce in prison-made goods, the Court had permitted itself to be outflanked on the basic issue of Congressional power to establish a prohibition of the movement of goods in interstate commerce based upon labor conditions under which they were produced.<sup>96</sup>

Aside from the important part it has played in bringing about a direct assault upon the principle of *Hammer v. Dagenhart*, the original Ashurst-Sumners Act was a significant piece of legislation in that through it judicial sanction was secured for employment of the commerce power as a means of extending the operative effect of the laws of destination states beyond their borders. By application of the formula embodied in this act an interstate commercial transaction may be, to all intents and purposes, brought under the

<sup>95</sup> See *Cong. Rec.*, 76th Cong., 3d Sess., pp. 4944, 6983, 8980, 9123, 9209, 9293, 11930-11939, 12388-12402, *S. Rept.* 1389, and *H. Rept.* 2641, 76th Cong., 3d Sess. Differences in the House and Senate versions of the bill necessitated the creation of a conference committee to reach agreement on the matter of exemptions of certain prison products.

<sup>96</sup> The report of the Senate Judiciary Committee on the Second Ashurst-Sumners Bill merely cited the case of *Whitfield v. Ohio* in support of its constitutionality. *S. Rept.* 1389, on S. 3550, 76th Cong., 3d Sess. Cf. the remarks of Senator Schwellenbach, of Washington, *Cong. Rec.*, 76th Cong., 3d Sess., p. 6984. The constitutionality of the Second Ashurst-Sumners Act would seem to be beyond question in view of the Supreme Court's declarations sustaining the constitutionality of the Fair Labor Standards Act in *United States v. Darby Lumber Co.*, 312 U. S. 100 (1941).

control of the state of destination. This control is exerted through the operation of federal laws and applies at the moment the goods in question come within the jurisdiction of the federal government at the outset of the transaction. The effect is substantially the same as that of a federal adoption of the laws of the respective destination states in the regulation of commerce. Such goods are subjected to the operation of state laws despite the fact of continued federal jurisdiction over them. They are also made subject to a national statute imposing a sanction to secure compliance with those laws. The Webb-Kenyon Act created a regime of commercial regulation in which the laws of the states of reception became controlling upon incoming shipments at the state boundary line; the Ashurst-Sumners Act created a regime of commercial regulation in which the laws of destination states are made operative upon an interstate shipment during the entire course of interstate movement. It provided a system of regulation for foreign and interstate commerce through joint action of Congress and the several state legislatures.

## CHAPTER IX

### FEDERAL REGULATIONS OF COMMERCE FOR THE PROTECTION OF SENDING STATES

FEDERAL regulations of commerce conditioned upon violation of the laws of receiving states have their counterpart in national laws designed to give support in a similar way to statutes of states in which interstate commerce originates. Coöperative legislation in support of the laws of sending states was first used at a very early period in the nation's history, but it was not extensively employed until the present century. Recent statutes have focused attention upon this type of regulatory measure, just as the Ashurst-Sumners Act and the Reed Amendment created interest in the use of the commerce power for the protection of the states of destination. Essentially the same problems in federal-state relationships are presented by the two forms of federal regulation. For the most part federal laws conditioned upon the violation of the laws of sending states have not carried with them an implication of federal consent to the enactment of the state statutes involved. In some few instances, however, they have been connected with state laws dealing with the actual movement of persons or goods from the state of origin. To this extent they present a question concerning the competence of Congress to amplify state powers by implied consent to state prohibition or regulation of out-going commerce.

#### 1. INSPECTION OF EXPORTS

A POLICY of coöperation with the states in the enforcement of their inspection laws with reference to exports has been followed by the United States continuously since 1790. The authority of the states to provide a system of inspection for goods moving in interstate and foreign commerce and to levy charges upon this commerce to defray inspection costs was recognized by implication in the Consti-

tution.<sup>1</sup> Their power to do so has been recognized by the Supreme Court.<sup>2</sup> Earlier inspection laws of the states were designed primarily to protect their foreign export trade by insuring proper grading, labeling, and packing of shipments. In 1790 Congress moved to the aid of the states in the enforcement of these inspection laws. An act was passed which instructed United States collectors of the customs and other port officials to "pay due regard to the inspection laws of the states in which they may respectively act, in such manner that no vessel having on board goods liable for inspection shall be cleared out until the master or other proper person shall have produced such certificate that all such goods have been duly inspected, as the laws of the respective states do or may require to be produced to collectors or other officers of the customs."<sup>3</sup> This provision was continued in a later customs act<sup>4</sup> and has remained upon the statute books to the present time.<sup>5</sup>

The aid to enforcement of state laws which it gives is indirect. The language of the act is such that the prohibition of clearance is conditioned upon failure to present a state certificate of inspection only if presentation to federal officers is required by state law. If there is no requirement that the certificate be produced, the restraint imposed by federal law does not apply.<sup>6</sup> No cases have arisen testing the validity of this provision, but in view of the attitude taken by the courts on similar conditional legislation, its constitutionality would seem to be beyond question. Since state authority to impose inspectional requirements is to be implied from the Constitution, it has been unnecessary to rely upon the federal act to confirm state power in this regard. The significance of the provision lies in the fact that it was the forerunner of other federal acts imposing a restriction upon the removal of goods from a state in order to secure compliance with state laws.

<sup>1</sup> Article I, sec. 10, cl. 2: "No state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

<sup>2</sup> *Turner v. Maryland*, 107 U. S. 38 (1883); *Patapsco Guano Co. v. Board of Agriculture*, 171 U. S. 345 (1898); *Pittsburgh and Southern Coal Co. v. Louisiana*, 156 U. S. 590 (1895).

<sup>3</sup> Act of April 2, 1790, 1 *Stat.* 106

<sup>4</sup> Act of March 2, 1799, c. 22, secs. 93, 112, 1 *Stat.* 627.

<sup>5</sup> *R. S.*, sec. 4202; 46 *United States Code* (1934), sec. 97.

<sup>6</sup> The act was so construed in *Bas v. Steele*, 2 F. Cas. 988 (No. 1,088) (Cir. Ct., Pa.) (1818).

## 2. GAME BIRDS AND ANIMALS

EMPLOYMENT of the federal commerce power to give aid in the enforcement of the laws of sending states was confined to the field of state inspection laws for over a century. The Lacey Act of 1900 constituted the next attempt to use federal authority to reinforce the laws of sending states. Agitation for passage of federal legislation regulating the shipment of the bodies of wild game animals and birds in interstate commerce had begun several years earlier. An obstacle to such legislation was discovered in the fact that there was considerable variation in state game-conservation laws. In some localities a legitimate traffic in game was carried on where wildlife appeared to be in no immediate danger of depletion. In other localities, where this danger seemed imminent owing to the activities of commercial hunters, state and local laws had been enacted to restrict traffic in game. The states with such conservation laws found it difficult to deal with offenders successfully, since adequate enforcement required tracing shipments of game to distant markets. When Representative Lacey, of Iowa, brought forward a bill in the Fifty-sixth Congress proposing to regulate this traffic by requiring the labeling of packages of game to indicate the nature of their contents, and prohibiting the shipment of game killed in violation of state law, a solution was found that was thought to be generally satisfactory. The bill embodying these regulations was quickly passed by Congress.<sup>7</sup>

Section 3 of the Lacey Act<sup>8</sup> contained the conditional-prohibition clause. This section made unlawful the delivery to a common carrier or the transportation by such carrier in interstate commerce of the bodies of foreign animals or birds the importation of which into the United States might be prohibited. It likewise forbade the shipment of the "dead bodies, or parts thereof, of any wild animals or birds, where such animals or birds have been killed in violation of the laws of the State . . . in which the same were killed." A proviso exempted from this prohibition the transportation of game birds or animals killed lawfully if the shipment of such game from the state was not prohibited by state law. Section 4 required all shipments of game in interstate commerce to be labeled.

<sup>7</sup> The legislative history of the measure is given in more detail *supra*, pp. 118-119. A clause subjecting game shipments to the laws of the states of destination was added during deliberations in Congress.

<sup>8</sup> Act of May 25, 1900, 31 *Stat.* 188.

These provisions of the Lacey Act were found to be poorly drafted to accomplish the intended purposes.<sup>9</sup> The third section was designed to give federal aid in the enforcement of state game-conservation laws of any kind if the facilities of interstate commerce in transporting game were used to defeat their enforcement. Judicial construction soon limited the conditional-prohibition clause to shipments of *illegally killed* game only, rather than to transportation of *any game* in violation of state law.<sup>10</sup> It was found also that the labeling-regulation penalty applied only to failure to label legal shipments of game rather than any shipment of game.<sup>11</sup> These shortcomings were remedied in the revision of the Criminal Code in 1909. The original act was amended to make the conditional prohibition apply both to game killed in violation of state law and to game illegally shipped from the state of origin; and the matter of the applicability of the penalty respecting labeling was clarified.<sup>12</sup>

The original Lacey Act provisions were amplified by further federal legislation in 1918, 1935, and 1936. A new basis for the exercise of federal authority in prohibiting commerce in game was provided when the United States-Canadian Migratory Bird Treaty was negotiated in 1916. By this treaty<sup>13</sup> the respective governments engaged themselves to prohibit the shipment or export of migratory birds or their eggs from any state or province of the respective countries during the close season in those jurisdictions; and to suppress international traffic in migratory birds or their eggs if "captured, killed, taken or shipped" contrary to the laws of either country or of any American state or Canadian province.<sup>14</sup> In 1937 a game-conservation treaty of a somewhat similar nature was ratified by the United States and Mexico.<sup>15</sup> While having the same general purpose as the United States-Canadian treaty in guaranteeing coöperation between the governments concerned in conservation measures, the United States-Mexican treaty differed from it in several important respects. The United States-Mexican treaty

<sup>9</sup> Section 5 of the act, the divesting section, was also found to be imperfectly drafted. See the discussion *supra*, pp 120 ff.

<sup>10</sup> *United States v. Smith*, 115 F 423 (D. C., M. D. Penn.) (1902).

<sup>11</sup> *United States v. Thompson*, 147 F. 637 (D. C., N. Dak.) (1906).

<sup>12</sup> Act of March 4, 1909, c. 321, secs 241-244, 35 *Stat.* 1137-1138.

<sup>13</sup> 39 *Stat.* 1702.

<sup>14</sup> United States-Canadian Migratory Bird Convention, sec. 7.

<sup>15</sup> 50 *Stat.* 1311.

envisaged coöperation between the governments of the two countries in the protection of certain game animals as well as migratory birds. The contracting powers did not engage themselves in direct terms to extend support to the enforcement of the laws of their respective states in relation to game. In regulating the introduction of game birds and animals through the channels of foreign commerce a delegation of a wide range of discretionary authority to administrative agencies in the respective countries was contemplated.

To carry out the obligations imposed upon the United States Government by these treaties three acts have been passed by Congress which strengthen the laws of the states and extend their influence into the field of interstate and foreign commerce. So far as the regulation of shipments of game is concerned, the authority of the federal government is exerted not only to insure compliance with its own conservation measures, but with those of the American states, Canada, the Canadian provinces, and Mexico as well. Soon after the ratification of the Canadian treaty, enforcing legislation was passed by Congress.<sup>16</sup> It was supplemented by additional legislation in 1935.<sup>17</sup> An enforcing act for the Mexican treaty was adopted in 1936.<sup>18</sup> These statutes not only set up an independent federal system of game-conservation rules and regulations, but also gave further aid to the states in the enforcement of their conservation laws.

In giving protection to the states these later laws overlap the conditional-prohibitory clause of the Lacey Act. Federal statutes now declare it to be unlawful to deliver, or knowingly to receive for shipment, or to ship or transport in interstate and foreign commerce any wild animal or bird, or the dead bodies or parts thereof, if "captured, killed, taken, shipped, transported, carried, purchased, sold, or possessed" contrary to the law of any state of the United States or of any foreign country or state or province thereof in which the game was taken;<sup>19</sup> to introduce any such game birds or

<sup>16</sup> Act of July 3, 1918, 40 *Stat.* 755.

<sup>17</sup> Act of June 15, 1935, 49 *Stat.* 380.

<sup>18</sup> Act of June 20, 1936, 49 *Stat.* 1555.

<sup>19</sup> 18 *U. S. C. A.* (1940 Supp.), sec. 392. This section was a part of the Act of June 15, 1935, 49 *Stat.* 380. Although the 1935 law overlapped the original Lacey Act on this point the earlier statute was not expressly repealed. The conditional-prohibition provision of the Lacey Act appears in 18 *United States Code* (1934), sec. 392.

animals into the United States or to purchase or receive them;<sup>20</sup> or to make any false record or render any false account concerning such purchases or shipments in interstate commerce.<sup>21</sup> The Canadian Bird-Treaty Act of 1918 also makes it unlawful to ship in interstate or foreign commerce any bird or part, nest, or egg thereof "captured, killed, taken, shipped, transported, or carried" at any time contrary to the laws of the state in which taken.<sup>22</sup> The Mexican Treaty Enforcement Act of 1936 makes unlawful the shipment of any game mammals from the United States to Mexico or from Mexico to the United States, except under permit or authorization of the Secretary of Agriculture. This officer is instructed to formulate regulations for this purpose "having due regard to" the laws of the American states and of the United Mexican States relating to the export of such animals, as well as to the laws of the American states and of the United States regarding importation of animals injurious to the interests of agriculture and horticulture.<sup>23</sup> Since this conditional-prohibition legislation now rests for the most part upon the game-conservation treaties, it finds support in the authority of Congress to pass laws carrying out treaty obligations, rather than in the commerce clause.

By legislation passed in 1930<sup>24</sup> the regulatory formula of the Lacey Act was applied to interstate and foreign shipments of black bass. Shipment was prohibited when such game fish were taken, sold, purchased, possessed, or transported in violation of the law of the state in which taken. Packages were required to be marked to show their contents. The laws of receiving states were also made operative upon such shipments by a divesting section following the Wilson Act formula.

Before the negotiation and ratification of the game-conservation treaties the conditional-prohibition features of the Lacey Act had been sustained by lower courts as a valid regulation of commerce.

<sup>20</sup> 18 U. S. C. A. (1940 Supp.), sec. 392.

<sup>21</sup> *Ibid.*

<sup>22</sup> 16 *United States Code* (1934), sec. 705

<sup>23</sup> 16 U. S. C. A. (1940 Supp.), sec. 705. By Reorganization Plan No. II, sec. 4(f), effective July 1, 1939, President Roosevelt transferred these functions of the Secretary of Agriculture to the Secretary of the Interior. For regulations established under this authorization see 16 U. S. C. A. (1940 Supp.), sec. 704

<sup>24</sup> Act of May 20, 1926, 44 *Stat.* 576, and Act of July 2, 1930, 46 *Stat.* 845, 16 *United States Code* (1934), secs. 851-855. The Black Bass Act was independent of the game-conservation treaties and draws its validity entirely from the commerce clause. The legislative history of this statute is given *supra*, p. 127.



The prohibitory clause was applied to forbid the shipment of quail legally killed in Oklahoma during the open season, since the laws of the state forbade the exportation of such game.<sup>25</sup> The Supreme Court of Arkansas held that the shipment of game delivered to an interstate carrier for export from the state in violation of its laws was illegal. This made the shipment liable to seizure by United States authorities and those of the destination state, so that the consignee had no claim for recovery against the carrier for nondelivery.<sup>26</sup> The same court also held that the violation of the federal labeling requirement rendered a shipment of wild ducks illegal, so that a shipper could not recover from a carrier for non-delivery when the shipment was seized by a conservation officer of another state.<sup>27</sup>

Opportunity was later given the Supreme Court to consider the validity of the section of the Bird-Treaty Act of 1918 prohibiting interstate shipment of game birds killed in violation of state law. By denying a writ of certiorari upon a ruling of a circuit court upholding the conditional-prohibition feature of the act the Supreme Court inferentially sustained its constitutionality.<sup>28</sup> This would

<sup>25</sup> *Rupert v. United States*, 181 F. 87 (C. C. A., Eighth) (1910).

<sup>26</sup> *Jonesboro, etc., Ry. v. Adams*, 117 Ark. 54, 174 S. W. 527 (1915). The case involved a shipment of wild ducks, killed in Arkansas and shipped to Chicago. A general statute of Arkansas prohibited the export of game for sale, but a special statute excepted from this prohibition shipments from the localities from which this shipment was made. The Court found the special statute invalid, which caused the general prohibitory state statute to be applicable. This made the conditional prohibition of the Lacey Act applicable also.

<sup>27</sup> *Eager v. Jonesboro, etc., Express Co.*, 103 Ark. 288, 147 S. W. 60 (1912). In this case a Missouri game warden had seized a shipment of wild ducks en route from Arkansas to Chicago. The shipment was not plainly marked to show contents of the packages, as required by the Lacey Act. In disallowing the claim of the shipper for damages, the Arkansas Supreme Court concerned itself only with the question of violation of the Lacey Act by delivery of goods improperly marked for shipment, and did not consider whether the seizure en route by a conservation officer of another state was valid. The seizure by a state officer in this circumstance would seem to have been sustainable only on the theory that illegality of the shipment under federal law divested it of protection under the commerce clause and made it subject to the laws of any state through which it might be sent. Cf. the discussion of this point in connection with the Webb-Kenyon Act, *supra*, ¶ p. 244-245.

<sup>28</sup> *Bogle v. White*, 61 F. (2d) 930 (C. C. A., Fifth) (1932); certiorari denied, 289 U. S. 737 (1933). The case concerned an interstate shipment of quail killed in violation of the laws of Mississippi and Tennessee. The court held that although quail were not migratory birds within the meaning of the Migratory

seem to have settled the faint doubt concerning the constitutionality of a federal prohibition of commerce in game taken or shipped in violation of state law. The federal statute in question was not only founded on the commerce power of Congress, but it had special authorization also as an enforcing act to effectuate the treaty obligations of the United States. Even if the latter basis had been lacking the same considerations which impelled the Court later to sustain the Dyer Act, prohibiting interstate commerce in stolen vehicles,<sup>29</sup> would have been controlling. Objections to a federal regulation of commerce conditioned upon a consummated violation of the laws of a sending state were swept aside by the Court in that instance. If the fact that the goods involved had a commercial value and were "innocent" in themselves had no force in defeating federal regulation in that case, it would likewise have no effect in rendering invalid a federal regulation of shipments of game.

By the enactment of these conditional-prohibition measures Congress has obviously given a much wider range of effectiveness to the game-conservation laws of the states. It remains to be considered whether by these prohibitions Congress has not consented to a wider exertion of authority by the states than is possible under their unsupported reserved powers. In the case of *Geer v. Connecticut*, decided in 1896, the point was established that a state enjoys authority under its reserved powers to regulate or prohibit the taking of game and to restrict its exportation.<sup>30</sup> The property interest of the state in such subjects was held to be superior to any resulting interference with interstate commerce. In *Foster-Fountain Packing Company v. Haydel*,<sup>31</sup> decided in 1928, the Court modified this earlier principle by holding that a state might not impose a direct burden upon the export of commercial products of its waters when the evident purpose was to give an advantage to local packing industries at the expense of those of neighboring states. The property interest of the state of Louisiana was not

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Bird Treaty, the terms of the enforcing act included them within its scope. The offense would have been covered by the terms of the original Lacey Act.

<sup>29</sup> *Brooks v. United States*, 267 U. S. 432 (1925); see *infra*, p. 319.

<sup>30</sup> 161 U. S. 519 (1896). A review of early judicial rulings on this question is given *supra*, pp. 114-118.

<sup>31</sup> 278 U. S. 1 (1928).

regarded as controlling to the extent of making valid a state law prohibiting the export of shrimp from which the hulls had not been removed.<sup>32</sup> In view of this ruling, reliance upon the federal statutes to give implied federal consent to state prohibition of the export of fish and game from the state might possibly be regarded as necessary where there is an element of local commercial advantage in state regulation of such exports.

Most of the cases involving state power to prohibit the export of fish or game were decided before the rendering of the *Haydel* decision. Consequently the courts were able to sustain state authority in such cases under the broad unqualified doctrine of *Geer v. Connecticut*, without reference to the Lacey Act prohibitions.<sup>33</sup> In one case, where a commercial interest of some importance was involved, the Supreme Court of Louisiana cited the Lacey Act as well as *Geer v. Connecticut* in disposing of the question of interference with interstate commerce.<sup>34</sup> The United States Supreme

<sup>32</sup> In *Bernard C. Gavit, The Commerce Clause of the United States Constitution* (1932), sec. 155, p. 323, it is maintained that this decision constituted a repudiation, impliedly at least, of the state-property basis for supporting such state regulation of exports. At any event, the Court repudiated the principle of unrestricted state power to control exportation of *ferae naturae* if a major commercial interest outside the state of production would be seriously affected.

<sup>33</sup> *Carey v. South Dakota*, 250 U. S. 118 (1919) (state law prohibiting the exportation of wild ducks valid); *In re Phoedavvus*, 177 Cal. 238, 170 Pac. 412 (1918) (state statute prohibiting the shipment of game from the state by mail valid); *State v. Dodge*, 117 Me. 269, 104 Atl. 5 (1918) (state statute requiring license fee of those engaged in exporting lobsters valid); *People v. Booth Fisheries Co.*, 253 Ill. 423, 97 N. E. 837 (1912) (power of state to prohibit export of game fish taken in its waters supported in *dictum*); *State v. Carson*, 147 Iowa 561, 126 N. W. 698 (1910) (state statute prohibiting shipment of game birds from state valid).

In *Bayside Fish Flour Co. v. Gentry*, 297 U. S. 422 (1936), the Supreme Court sustained a state statute regulating the processing of sardines against a claim of interference with interstate commerce, even though some of the fish to which the law was applied were taken outside the state's waters and all the products of the concern involved interstate commerce. The Court distinguished the *Haydel* ruling by pointing out that in the instant case there was a legitimate conservation purpose in the state regulation.

For a discussion of this general question see W. Lewis Roberts, "The Right of a State to Restrict Exportation of Natural Resources," 24 *Kentucky Law J.* 259, 261 (March, 1936), and Dwight Williams, "The Power of a State to Control the Use of Its Natural Resources," 11 *Minnesota Law Rev.* 129, 143 (Jan., 1927).

<sup>34</sup> *LaCoste v. Department of Conservation*, 151 La. 909, 92 So. 381 (1922). The statute involved was one imposing a severance tax upon dealers in the skins of wild animals. The court held that the Lacey Act covered the requirement of federal assent to a tax upon exports, if the payment required were considered to be in any sense such a tax.

Court affirmed the state court's ruling without placing any reliance upon the federal statute.<sup>35</sup>

The conclusion must be reached that, on the whole, the conditional-prohibition clause of the Lacey Act has been of little consequence in causing the courts to define more broadly the powers of the states in regulating the exportation of fish and game. The clause may have the effect of enabling states through which illegal shipments are made to seize them, but this point has not been fully clarified by judicial decisions. The fact that federal regulations now in effect on the subject of interstate transportation of game are designed mainly to carry out obligations undertaken in treaties has obscured to some extent issues arising from the Lacey Act. The federal laws in force at present have provided for a wider and more effective enforcement of state game-conservation regulations. It is possible, also, that they provide a basis for the enactment of state laws reaching subjects ordinarily outside the jurisdiction of states by reason of the commerce clause.

### 3. THE SUPPRESSION OF CRIMES AGAINST LIFE AND PROPERTY

IN 1919 there was passed the first of what proved to be a series of Congressional acts designed to aid the states in the suppression of crimes against life and property. These acts have as their aim the protection of life and property generally, but as regulations of commerce they are prohibitions conditioned upon the commission of offenses recognized by the laws of the state of origin. Although not made dependent in every instance upon the violation of state laws in specific terms they fit into the general pattern of legislative acts designed to give federal aid in the enforcement of such laws. Since they relate to offenses over which the states have undoubted power to legislate and have legislated upon generally the constitutional issue raised by them is the question of the authority of Congress to prohibit interstate commerce in the subjects to which the acts apply. No question of delegation of power to the states is involved.

The foundations for these recent extensions of aid to the states under the commerce clause were laid in earlier "federal police-

<sup>35</sup> *LaCoste v. Department of Conservation*, 263 U. S. 545 (1924). The Supreme Court held the contention that the state act interfered with interstate commerce to be irrelevant, since the skins had not entered into interstate commerce when the tax liability was incurred.

power" statutes. Prior to 1919 Congress had sought to protect the public health, safety, and morals through laws imposing various restraints upon interstate and foreign commerce.<sup>36</sup> Among these earlier statutes were the Animal Quarantine Act of 1884,<sup>37</sup> the forerunner of a series of laws designed to afford protection against the spread of disease and contagion through animals,<sup>38</sup> the Comstock Law of 1897,<sup>39</sup> the Lottery Act of 1895,<sup>40</sup> the Pure Food and Drugs Act of 1906,<sup>41</sup> the Meat Inspection Act of 1907,<sup>42</sup> and the White Slave Act of 1910.<sup>43</sup> These laws were not framed in terms of direct reference to state regulations. They were designed, however, to lend support to those states which had enacted legislation having similar objectives. Implicit in them was the question whether their indirect support of state statutes was of any significance in the determination of their validity under the commerce clause.

Cases upholding the constitutionality of these laws did not clarify this point, although it received judicial notice. Thus in *Champion v. Ames* Justice Harlan, giving the opinion of the Court in support of the constitutionality of the Lottery Act, declared:

In legislating upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those states—perhaps all of them—which, for the protection of public morals, prohibits the drawing of lotteries, as well as the sale and circulation of lottery tickets, within their respective limits. It said, in effect, that it would not permit the declared policy of the states, which sought to protect their people against the mischief of the lottery business, to be overthrown or disregarded by the agency of interstate commerce.<sup>44</sup>

On the other hand, a minority of the Court, speaking through Chief Justice Fuller, denied that Congress should be accorded power on the ground that federal action was necessary to supplement state regulation.<sup>45</sup>

<sup>36</sup> Cf. Edward S. Corwin, "Congress's Power to Prohibit Commerce: A Crucial Constitutional Issue," 18 *Cornell Law Quart.* 477 (June, 1933).

<sup>37</sup> Act of May 29, 1884, 23 *Stat.* 32.

<sup>38</sup> Cf. 21 *United States Code* (1934), secs. 101 *et seq*

<sup>39</sup> Act of Feb. 8, 1897, 29 *Stat.* 512; 18 *United States Code* (1934), sec. 396.

<sup>40</sup> Act of March 2, 1895, 28 *Stat.* 963; 18 *United States Code* (1934), sec. 387.

<sup>41</sup> Act of June 30, 1906, 34 *Stat.* 768, 21 *United States Code* (1934), secs. 1-15.

<sup>42</sup> Act of March 4, 1907, 34 *Stat.* 1260; 21 *United States Code* (1934), secs. 71-91.

<sup>43</sup> Act of June 25, 1910, 36 *Stat.* 825; 18 *United States Code* (1934), secs. 397-404.

<sup>44</sup> 188 U. S. 321, 357 (1903).

<sup>45</sup> *Ibid.*, p. 372: "It will not do to say—a suggestion which has heretofore been

The idea of a complementary relationship between federal and state power was evidently in the mind of Justice McKenna, who rendered the opinion of the Supreme Court in *Hoke v. United States*, sustaining the validity of the White Slave Act. The Court said:

Our dual form of government has its perplexities, State and Nation having different spheres of jurisdiction, as we have said, but it must be kept in mind that we are one people, and the powers reserved to the States and those conferred on the Nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral.<sup>46</sup>

The development of a federal "police power" under the commerce clause received a severe check in *Hammer v. Dagenhart*.<sup>47</sup> In a five-to-four decision a federal prohibition of commerce in goods manufactured in factories in which children were employed was held to be an unconstitutional invasion of the reserved powers of the states. Shortly before this, however, the Supreme Court had sustained Congressional prohibition of commerce in intoxicating liquors as a means of sanctioning the enforcement of state laws upon this particular subject matter.<sup>48</sup> This ruling pointed the way toward further employment of the federal commerce power to supplement state legislative action by prohibiting commerce carried on with the intent of violating state laws. A series of federal statutes designed to aid the states in the suppression of crimes against life and property was the eventual outcome.

#### A. STOLEN PROPERTY

The first of these acts was the Dyer Automobile Theft Act of 1919.<sup>49</sup> Owing to increasing difficulties which the states were encountering in detecting and punishing automobile thefts Congress deemed it necessary to support their efforts by federal legislation.<sup>50</sup>

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made in this case—that state laws have been found ineffective for the suppression of lotteries, and therefore Congress should interfere. The scope of the commerce clause of the Constitution cannot be enlarged because of the present views of the public interest."

<sup>46</sup> 227 U. S. 308, 322 (1913).

<sup>47</sup> 247 U. S. 251 (1918).

<sup>48</sup> *Clark Distilling Co. v. Western Maryland Ry. Co.*, 212 U. S. 311 (1917); see *supra*, pp. 227 ff.

<sup>49</sup> Act of Oct. 29, 1919, 41 Stat. 324; 18 United States Code (1934), sec. 408.

<sup>50</sup> *H. Rept.* 312, on H. R. 9203, 66th Cong., 1st Sess.

The Dyer Act declared it to be a criminal offense to transport stolen cars across state lines or to receive, conceal, sell, or dispose of them. Appropriate penalties were included. No question concerning the constitutionality of the measure was raised in Congress.<sup>51</sup>

In 1933, as a result of further difficulties which the states were having in dealing with crimes of an interstate character, a subcommittee of the Senate Committee on Interstate Commerce made an intensive study of the possibilities of aiding the states in the suppression of major crimes by the enactment of legislation under the federal commerce power.<sup>52</sup> One of the products of this study was a measure extending the principle of the Dyer Act to certain other forms of stolen property. The 1934 Stolen Property Act<sup>53</sup> made illegal the transportation in interstate and foreign commerce of "goods, wares, merchandise, securities or money" valued at \$5,000 or more, if such property is known to have been "stolen, feloniously converted, or taken feloniously by fraud or with the intent to steal or purloin." The reception, concealment, sale, or disposal, or the transaction of a loan upon such goods was likewise forbidden. Heavier penalties than those provided in the Dyer Act were specified. In 1939 the 1934 law was amended to include within its scope "falsely made, forged, altered, or counterfeited securities" and also implements to be used in counterfeiting securities. The \$5,000 value limit was not made to apply to these articles.<sup>54</sup>

Pronouncements of the courts have seemingly cleared the ground of any constitutional barriers to legislation prohibiting

<sup>51</sup> A clause in the original bill provided that an acquittal or conviction on a theft charge in a state court should be a bar to prosecution under the federal law. This provision was objected to in the House on constitutional grounds but was included in the bill as it passed that body. It was eliminated in the Senate, and the House concurred in the Senate amendment. *Cong. Rec.*, 66th Cong., 1st Sess., pp. 5470-5478, 6433-6435, 6827.

<sup>52</sup> For an account of the work of the subcommittee see the statement of its chairman, Senator Copeland, of New York, *Cong. Rec.*, 73d Cong., 2d Sess., p. 448. The subcommittee prepared thirteen bills for introduction in the Senate to deal with the crime problem. Among measures passed as a result of this report, in addition to the Stolen Property Act, were the Fugitive Felon Act and an act revising the Lindbergh Kidnaping Law, both of which are described *infra*, pp. 321-325.

<sup>53</sup> Act of May 22, 1934, 48 Stat. 794; 18 *United States Code* (1934), secs. 413-418. Cf. Jerome Hall, "Federal Anti-theft Legislation," 1 *Law and Contemporary Problems* 424 (Oct., 1934).

<sup>54</sup> Act of Aug. 3, 1939, 53 Stat. 1178; 18 *U. S. C. A.* (1940 Supp.), secs. 413-419.

interstate commerce in stolen property. The constitutionality of the Dyer Act was sustained in the case of *Brooks v. United States*.<sup>55</sup> The chief question raised was whether Congress, in view of the pronouncements of the Supreme Court in *Hammer v. Dagenhart*, might prohibit interstate and foreign commerce in stolen vehicles. The Court in the *First Child Labor Case* had apparently based its denial of Congressional power in some degree upon the fact that the goods involved were not intrinsically harmful. Stolen cars were not harmful goods, per se. The Court was able to distinguish the circumstances of the two cases. It found that a prohibition of commerce in stolen vehicles was within Congressional competence.

Chief Justice Taft, who offered the opinion of the Court in *Brooks v. United States*, evidently had some difficulty in reaching this conclusion. The Chief Justice did not base the distinction between the case at hand and *Hammer v. Dagenhart* on the fact that the Dyer Act was in aid of the enforcement of state law in every instance whereas the Child Labor Act was not. The point was stressed rather that the Dyer Act, like the earlier Lottery Act, Pure Food Act, White Slave Act, Prize-Fight Film Act and other "police-power" regulations of commerce, was for the purpose of preventing the spread of evil or harm to the people of other states from the states of origin; while the Child Labor Act was an attempt to regulate matters falling within the reserved powers of the state of origin.<sup>56</sup> This was hardly a valid distinction to make. The Child Labor Act had as one of its objectives the *protection of wage standards* in the states of reception. It was not designed solely as a protection for the child laborers affected. Moreover, the Dyer Act was primarily to protect the property rights of car owners in the *state of origin*. This the Court practically admitted in the opinion.<sup>57</sup> The Court was placed in the rather indefensible position of maintaining that Congress may show concern for a violation of *property* rights in states of origin by its regulations of commerce, but it may not legislate under the

<sup>55</sup> 267 U. S. 432 (1925).

<sup>56</sup> *Ibid.*, pp. 436-438.

<sup>57</sup> *Ibid.*, p. 448: "Congress may properly punish such interstate transportation by anyone with knowledge of the theft, because of its harmful result and its defeat of the property rights of those whose machines against their will are taken into other jurisdictions." (Italics mine) Cf. Corwin, *op. cit.*, p. 500



commerce power for the protection of the *social well-being* of an economically weak class of individuals.

The unwillingness of the Court to base its distinction between the two cases on the point that the Dyer Act in every instance supported the legislative policies of the states of origin, while the Child Labor Act did not, may have been due to the recency of its declaration in the case of *United States v. Hill*. There the Court had stated unequivocally that the commerce power of Congress was "not to be limited by state laws."<sup>58</sup> To harmonize this statement and a declaration that a federal prohibition of commerce in stolen vehicles was valid because it was in support of state laws would have been difficult. Hence coincidence in the objectives of the federal law and state laws was not made a controlling point. The constitutionality of the Federal Stolen Property Act has not been questioned in the Supreme Court.<sup>59</sup> The declarations of the Court in *Brooks v. United States* would seem to be sufficiently broad to cover the question.

The extension of federal power in this direction has recently been checked through the use of the presidential veto. A bill, sponsored by Senator McCarren, of Nevada, proposing to extend the principle of the National Stolen Property Act to stolen farm animals and domestic fowl passed Congress in 1937.<sup>60</sup> It was pocket-vetoed by President Roosevelt on the ground that it would be an unwarranted extension of federal jurisdiction to matters properly left with the states.<sup>61</sup> A second bill of the same general nature was passed in 1939 by the Seventy-sixth Congress.<sup>62</sup> It also met a presidential veto. Stating more fully his objections to such

<sup>58</sup> 248 U. S. 420, 427 (1919).

<sup>59</sup> Its constitutionality was affirmed in *United States v. Miller*, 17 F. Supp. 65 (W. D. Ky.) (1936). The facts of the case are given *infra*, p. 323, note 73.

<sup>60</sup> For the legislative history of the bill (S. 1375) see *Cong. Rec.*, 75th Cong., 1st Sess., pp. 883, 5347, 5652, 5802, 8348, 9000, 9539, 9547, 9597, 9613, and *S. Rept.* 688 and *H. Rept.* 1448, 75th Cong., 1st Sess. A bill on the same subject (H. R. 5901), introduced by Representative Sumners, of Texas, passed the House, but was not acted upon by the Senate. Senator McCarren's bill would have made it a federal offense to transport in interstate commerce cattle, hogs, sheep, horses, mules, domestic fowl, and the carcasses or hides thereof if they were known to have been stolen. Disposal of them after such transportation would also have been prohibited.

<sup>61</sup> *Cong. Rec.*, 75th Cong., 1st Sess., p. 9631. Attorney General Cummings expressed opposition to the bill on the same grounds. See *H. Rept.* 1448, on S. 1375, 75th Cong., 1st Sess.

<sup>62</sup> The bill was introduced by Senator McCarren. It passed without a record vote in either House. *Cong. Rec.*, 76th Cong., 1st Sess., pp. 66, 1057, 5537, 6081. In

a measure, President Roosevelt pointed out that it proposed a serious encroachment upon the police powers of the states, and that it would entail an expenditure of at least \$200,000 for enforcement. He raised the question of how federal protection against the theft of other forms of property of comparatively low value could be withheld if it were extended to the kinds specified in the bill. In conclusion, he urged Congress to consider seriously the "ultimate implications" of legislation of this type.<sup>63</sup> In 1940, during the third session of the same Congress, the McCarren Bill was promptly passed for the third time and sent to the President for his signature. Although supporters of the measure in the House claimed to have received assurances that it would meet with executive approval, the bill was again vetoed. The veto message, transmitted to Congress on October 21, 1940, cited as reasons for nonapproval the objections advanced against the bill passed in 1939.<sup>64</sup>

It remains to be seen whether the President or Congress will triumph in this contest over the extension of federal aid in the suppression of cattle-rustling, hog-stealing, and similar crimes. The question involved is merely one of federal policy, since the constitutional issue has apparently been settled by the *Brooks* case.

#### B. KIDNAPED PERSONS

Federal aid has been extended to the states in the suppression of the crime of kidnaping. Moved by the disclosures in the Lindbergh kidnaping incident, Congress in 1932 passed the Patterson Act.<sup>65</sup> This law made it a federal offense to transport in interstate commerce a person known to have been "unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away" and held for ransom. In 1934 the earlier law was amended to make federal aid more effective in the prevention of this crime.<sup>66</sup>

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this bill the prohibition against interstate transportation of stolen domestic fowl which appeared in the bill as passed in 1937 was omitted. This provision had caused the measure to be referred to by its critics as a proposal to punish "chicken-stealing" by federal act.

<sup>63</sup> *Cong. Rec.*, 76th Cong., 1st Sess., pp. 6081-6082. The veto message appears in *S. Doc.* 77, 76th Cong., 1st Sess.

<sup>64</sup> For the legislative history of the third McCarren Bill (S. 3786) see *Cong. Rec.*, 76th Cong., 3d Sess., pp. 4569, 6781, 7100, 13406-13407, 13589. The veto message is given *ibid.*, p. 13589, and in *S. Doc.* 308, 76th Cong., 3d Sess.

<sup>65</sup> Act of June 22, 1932, 47 Stat. 326.

<sup>66</sup> Act of May 18, 1934, 48 Stat. 781; 18 *United States Code* (1934), secs. 408a-408c. The 1934 revision changed the original act in four main respects: it was no longer necessary to show that a kidnaped person was being held for ransom

The constitutionality of the Lindbergh Law has not been considered by the Supreme Court, although it has been construed and applied by that body.<sup>67</sup> Lower courts have sustained its constitutionality in two instances.<sup>68</sup> The reasoning which enabled the Court to sustain the White Slave Act and the Dyer Act would undoubtedly cover the Lindbergh Law as well. In *Hoke v. United States*<sup>69</sup> the Court established the authority of Congress to prohibit the movement of persons in interstate commerce in order to achieve a police-power objective within the range of state authority. The ruling in *Brooks v. United States*<sup>70</sup> proceeded on the broad principle that Congress may deny the facilities of interstate commerce to those who would make use of them to escape the penalties of the law of a state in which a crime against property rights has been committed. These principles are apparently broad enough to warrant a federal prohibition of the use of interstate transportation and communication facilities for the consummation of a crime against both life and property. If Congress may reach stolen property with its regulations of commerce, it may also reach persons held under duress.<sup>71</sup> Although the protection of the interests of persons in the state of reception is not so clearly evident as in the case of the Dyer Act and the Stolen Property Act, it is unlikely that the Court would attach any weight to this distinction.

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or reward, an exception was made in the case of a minor child removed from a state by a parent; a presumption was created that a kidnaped person had been moved across state lines if not released in seven days, so as to justify intervention by federal enforcement officers; and the death penalty was authorized to be inflicted upon offenders. Cf. Horace L. Bomar, Jr., "The Lindbergh Law,"

<sup>1</sup> *Law and Contemporary Problems* 435 (Oct., 1934).

<sup>67</sup> *Gooch v. United States*, 297 U. S. 124 (1936).

<sup>68</sup> *Bailey v. United States*, 74 F. (2d) 451 (C. C. A., Tenth) (1934); *Seadlund v. United States*, 97 F. (2d) 742 (C. C. A., Seventh) (1938). Cf. *United States v. Dressler*, 112 F. (2d) 972 (C. C. A., Seventh) (1940).

<sup>69</sup> 227 U. S. 308 (1913).

<sup>70</sup> 267 U. S. 432 (1925).

<sup>71</sup> In *Seadlund v. United States*, 97 F. (2d) 742, 747 (C. C. A., Seventh) (1938), the court declared: "If Congress, under its authority to regulate commerce, may penalize one who transports in interstate commerce, a stolen motor vehicle, or may prohibit the transportation from state to state of women for immoral purposes, as the Supreme Court has said it may do, we are unable, by any process of reasoning at our command, to discern why Congress may not likewise penalize the transportation of a person who has been kidnaped and held for ransom. In the first case property rights are sought to be protected; in the second, the morals of the community; and in the instant case, liberty and perhaps life itself." Cf. the note, "The Constitutionality of the Lindbergh Law," 69 *United States Law Rev.* 343 (July, 1935).

## C. FUGITIVE FELONS

One of the most far-reaching of all these recent federal anti-crime statutes is the Fugitive Felon Act,<sup>72</sup> also passed in 1934. This statute declares it to be a federal offense, punishable by fine or imprisonment or both, for any person to move or travel in interstate commerce from any state with intent to avoid prosecution for murder, kidnaping, burglary, robbery, mayhem, rape, assault, or extortion under the laws of the place from which he flees. Flight across state lines for the purpose of avoiding the giving of testimony in any case involving such offenses is also made punishable by the federal statute. A vigorous enforcement of this law would render unnecessary resort to the extradition process by states in those instances where it is applicable. The statute provides that prosecution for the federal offense must be in the district from which the offender has fled. Hence he may be released by federal authorities into the hands of local officers for prosecution by the state at the scene of the commission of a state offense, if such a course is deemed desirable.

The constitutionality of the Fugitive Felon Act as an exercise of power to regulate commerce has not been considered by the Supreme Court, but it has been sustained in lower courts where the question has been raised.<sup>73</sup> There is little reason to doubt that the Supreme Court would take the same position on this point. The authority of Congress to regulate interstate commerce has been

<sup>72</sup> Act of May 18, 1934, 48 Stat. 782; 18 *United States Code* (1934), sec. 408e. Cf. Harry S. Toy and Edmund E. Shepherd, "The Problem of Fugitive Felons and Witnesses," 1 *Law and Contemporary Problems* 415 (Oct., 1934).

<sup>73</sup> *United States v. Miller*, 17 F. Supp. 65 (W. D. Ky.) (1936), *Simmons v. Zerbst*, 18 F. Supp. 929 (N. D. Ga.) (1937). The statute was construed in the case of *Barrow v. Owen*, 89 F. (2d) 476 (C. C. A., Fifth) (1937), but the question of constitutionality was not examined.

In *United States v. Miller* the defendant had committed a robbery in Kentucky and had fled across the state line with his loot. He was indicted for violation of both the Stolen Property Act and the Fugitive Felon Act. On the point of the constitutionality of the latter law the court declared (at p. 68): "In the exercise of its plenary authority to protect interstate and foreign commerce, Congress may declare punishable any offense which interferes with, obstructs, or prevents such commerce, or makes it a vehicle for crime. . . . It may make a crime the use of interstate commerce by a fleeing criminal in order to aid the states in the apprehension of the guilty and make certain, swift and sure the punishment of those who commit crimes against the states. If such power be not lodged in the Congress, then the unity of our people is destroyed and the states crippled in punishing those who violate their laws and flee to another state."

held to include the movement of persons.<sup>74</sup> Unless the Court should choose to take the same position in regard to the commerce power that it took in connection with the taxing power in *United States v. Constantine*,<sup>75</sup> the fact that the federal statute is conditioned upon an intent to evade punishment under state laws should not cause the Fugitive Felon Act to fail of constitutionality.<sup>76</sup>

These recent anticrime statutes are illustrative of the potentialities of the commerce clause as an avenue through which the United States Government may enter into partnership with the states in dealing with matters primarily of state concern.<sup>77</sup> It is true that the crimes referred to in these federal statutes are known to the common law, and hence their applicability in a strict sense is not directly dependent upon the existence of state laws defining and providing punishment for the offenses to which they make reference. The fact remains that their purpose is to render aid in the enforcement of state laws directed against the crimes specified. By making a prohibition of commerce contingent upon the violation of state laws protecting life and property these federal acts in effect give an extraterritorial application to state statutes. The offender escapes from the jurisdiction of the state in which he has committed an offense only to encounter the arm of the United States raised against him. A violation of state law involves a violation of federal law as well if the facilities of interstate commerce are made use of to escape punishment by the state wherein the offense is committed.

The possibilities of exploitation of such regulatory authority by Congress seem almost as vast and the implications of such a theory of federal-state relationships almost as "startling" as those which led the Court in *United States v. Constantine* to disallow the

<sup>74</sup> *Hoke v. United States*, 227 U. S. 308 (1913).

<sup>75</sup> 296 U. S. 287 (1935); see *supra*, p. 294.

<sup>76</sup> A favorable view on the question of the constitutionality of the act is taken by John W. Brabner-Smith in "The Commerce Clause and the New Federal 'Extradition' Statute," 29 *Illinois Law Rev.* 335 (Nov., 1934), and by Toy and Shepherd, *op. cit.* See also the note on "Federal Control of Crime—Scope of Power to Regulate Crime under the Commerce Clause," 32 *Michigan Law Rev.* 378, 385 (Jan., 1934).

<sup>77</sup> For a comprehensive discussion of these and other recent efforts of the federal government to aid the states in the suppression of crime see the symposium "Extending Federal Powers over Crime" in 1 *Law and Contemporary Problems* 400 (Oct., 1934).

use of the federal taxing power for similar ends. There has been no indication as yet that the Supreme Court feels that there is any danger in permitting Congress to exploit this field of regulative authority further. Recent developments indicate that further extension of federal powers in this direction will be checked by the reluctance of the law-making branch to act, rather than by judicial denial of power to Congress to legislate along these lines.<sup>78</sup> If the Court should deem extension of federal authority by such measures dangerous to the balance of power between the nation and the states, the principle of the *Constantine* case would supply a ready basis upon which it might establish limits to the use of the federal commerce power to support state laws.

#### 4. CONTRABAND OIL

ONE of the most important applications of the state-aid method of federal commercial regulation to date, as measured by the economic interests affected, occurred when federal assistance was extended to oil-producing states in the enforcement of their oil-conservation and marketing-control measures. The peculiar competitive conditions under which the oil industry operated caused the chief oil-producing states to adopt production and marketing restrictions in the 1920 decade. The purposes were to assure maintenance of prices and to prevent wastage of oil resources and cutthroat competitive operation by producers.<sup>79</sup> A measure of interstate cooperation by informal agreements had been achieved by 1930, but the states had not been fully successful in enforcing their regulations. Illegally produced oil continued to enter into the stream of interstate commerce in considerable quantities. Depression condi-

<sup>78</sup> The defeat by presidential vetoes of proposals to broaden the applicability of the Stolen Property Act has been noted *supra*, p. 320. In the Seventy-sixth Congress bills were introduced proposing to make it a federal offense to cross state lines with the intent to avoid support of dependent children (H. R. 4577), or to enter into a bigamous marriage (S 2090). Neither of these bills was reported out of committee, but they indicate possible lines of development which may be pursued.

<sup>79</sup> An analysis of earlier state oil-conservation and oil-marketing legislation is given in Northcutt Ely, "The Interdependence of the States in Oil Conservation," pp. 1-4, an address before the Petroleum Division of the American Institute of Mining and Metallurgical Engineers, Sept. 30, 1932 (mimeographed). See also J Howard Marshall and Norman L. Meyers, "Legal Planning of Petroleum Production: Two Years of Proration," 42 *Yale Law Journal* 701 (March, 1933)

tions ensuing after 1930 accentuated the problem of producing states in checking the flow of "hot" oil from their fields.<sup>80</sup>

Representatives of the oil industry appealed to Congress for aid. Federal approval of the formulation of interstate compacts to control the production and marketing of oil was sought, and also federal assistance in preventing the movement of illegally produced oil in interstate commerce. In some quarters federal assumption of control over the entire industry was urged. The National Recovery Act of 1933<sup>81</sup> embodied the first response of Congress to these demands. This law not only provided for a system of self-regulation for the oil industry through codes of fair competition, but included also a clause authorizing the prohibition of the movement of "contraband oil" in interstate and foreign commerce upon order of the President.<sup>82</sup> "Contraband oil" was defined as oil produced, transported, or removed from storage in violation of any state law.

When this section of the National Recovery Act was found unconstitutional by the Supreme Court as an excessive delegation of power to the President,<sup>83</sup> several bills were immediately introduced in the House and Senate to establish the same conditional prohibition by legislative direction. The Senate acted favorably upon a bill of this character introduced by Senator Connally.<sup>84</sup> The House passed the bill promptly, but introduced amendments

<sup>80</sup> See *Hearings Pursuant to H. R. 441 on Regulation of the Petroleum Industry*, House Committee on Interstate and Foreign Commerce, 73d Cong., 1st Sess. (1934).

<sup>81</sup> Act of June 16, 1933, 48 Stat. 195.

<sup>82</sup> *Ibid.*, Title I, sec. 9(c) Bills dealing with the interstate shipment of "hot" oil were introduced by Senator Capper, of Kansas, and Representative Marland, of Oklahoma, but were not acted upon. In reporting out the National Recovery Bill (H. R. 5755) the Senate Finance Committee, on the suggestion of Senator Connally, of Texas, recommended the inclusion of the conditional prohibitory clause. *S. Rept.* 114, proposed amendment No. 14, on H. R. 5755, 73d Cong., 1st Sess. This amendment was adopted and remained in the completed measure. An amendment by Senator Thomas, of Oklahoma, which would have given the President authority to supplement state conservation laws by national regulations, as well as to control the interstate movement of contraband oil, was rejected by the Senate. *Cong. Rec.*, 73d Cong., 1st Sess., pp. 5258, 5294-5298, 5299. The constitutionality of the Connally amendment was not challenged in the debates on the Recovery Bill.

<sup>83</sup> *Panama Refining Co. v. Ryan*, 293 U. S. 388 (1935).

<sup>84</sup> *Cong. Rec.*, 74th Cong., 1st Sess., pp. 694, 755, 764. The bill acted upon was S. 1190.

necessitating the setting up of a conference committee.<sup>85</sup> There was no disagreement between the two Houses on the conditional-prohibition provision of the measure, however, and the bill became law with this fundamental feature included.<sup>86</sup> The period of operation of the act was limited by its terms to two years. Congress in 1937 extended its duration another two years, causing it to be effective until June 30, 1939.<sup>87</sup> Its life was extended an additional three years in 1939.<sup>88</sup>

The provisions of the Connally Act pertinent to the regulation of commerce in petroleum were: (1) a definition of "contraband oil" as petroleum produced, transported, or withdrawn from storage in excess of the amounts permitted under the laws of a state or under any proper regulation of a state administrative agency; and also the products of such petroleum obtained by refining, processing, or manufacturing;<sup>89</sup> (2) a prohibition upon the shipment of such contraband oil or oil products from the state of production under penalty of forfeiture of the goods involved and possible fine or imprisonment; (3) a grant of authority to the President to suspend this prohibition if he finds that the amount of petroleum and petroleum products moving in interstate com-

<sup>85</sup> *Ibid.*, p. 2150.

<sup>86</sup> Act of Feb. 22, 1935, 49 *Stat.* 30, 15 *U. S. C. A.* (1940 Supp.), secs. 715-715(l).

<sup>87</sup> Act of July 16, 1937, 50 *Stat.* 257.

<sup>88</sup> Act of June 29, 1939, *Public*, No. 158, 76th Cong., 1st Sess. In *United States v. Powers*, 307 U. S. 214 (1939), the Supreme Court held that it was the intent of Congress in successive extensions of the Connally Act to give it continuous effectiveness and to authorize prosecutions for violations committed at any time during the life of the statute. A prosecution begun after the expiration of the first two years of effectiveness of the act for an offense committed during that two-year period was not void by reason of the clause of the Constitution prohibiting ex post facto legislation by Congress.

<sup>89</sup> To further interstate cooperation in the control of oil production and marketing, Congress shortly after the passage of the Connally Act gave its approval to the formation of interstate compacts on this subject. Act of Aug. 27, 1935, 49 *Stat.* 939. A discussion of the resulting compacts is given in Northcutt Ely, "The Conservation of Oil," 51 *Harvard Law Rev.* 1209 (May, 1938). A plan of proration of production among the chief producing states is formulated annually by the United States Bureau of Mines, and after discussion and, possibly, modification it is adopted and put into effect by the administrative authorities of the cooperating states. According to the report of the Senate Finance Committee in 1939 on Senator Connally's bill to make the act permanent (*S. Rept.* 179, on S. 1302, 76th Cong., 1st Sess.), six oil-producing states, which supply seventy per cent of the country's oil, cooperate in limiting production. California and Illinois are the chief oil-producing states which have not entered into the oil compact.



merce is so limited as to cause a lack of parity between supply and demand, with a resulting burden upon interstate commerce; and (4) a provision for enforcement of these regulations through a system of clearance certificates.

In the *Panama Refining Company* case Chief Justice Hughes had pointedly refrained from expressing the Court's views on the question whether Congress might by direct statutory provision prohibit interstate shipment of contraband oil. This circumstance led a number of critics of the Connally Bill in Congress to question the authority of Congress to establish the proposed prohibition.<sup>90</sup> In defending this provision Senator Connally emphasized particularly the analogy between the measure in question and the Dyer and Lacey acts.<sup>91</sup> He argued that if Congress could prohibit the shipment of goods such as vehicles and game so as to give assistance to the enforcement of state law, it might do the same with petroleum. The principle of the *First Child Labor Case*, he maintained, did not apply, even though the control of production was involved, because in the proposed measure federal authority was exerted only in respect to goods already condemned and made contraband by the laws of the states. There was no invasion of state authority, but rather a reinforcement of it.<sup>92</sup>

In the House, Representative Pettingill of Indiana attacked the proposal as an unconstitutional delegation of power to the President and to the states.<sup>93</sup> The argument advanced on the latter point was that it sanctioned in effect a state prohibition of the export of petroleum in violation of the commerce clause of the Constitution. The attack upon the bill as a delegation of power to the states was not pushed vigorously. The measure passed in each House without a record vote.

The Connally Act presents in many respects the same constitutional issues as those involved in the Ashurst-Sumners Act, but with the fundamental difference that the former act is designed to give protection to the sending state, whereas the latter gives protec-

<sup>90</sup> See the remarks of Senator Borah, of Idaho, Senator King, of Utah, and Senator Glass, of Virginia, *Cong. Rec.*, 74th Cong., 1st Sess., pp. 755-762. It was also contended that the clause authorizing the President to suspend the operation of the section prohibiting interstate shipment was unconstitutional under the principle of the *Panama Refining Company* case.

<sup>91</sup> *Ibid.*, pp. 754-755.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*, pp. 653-657.

tion to the receiving state. In both the broad objective is the elimination of an economic evil. In both the authority of Congress is exercised in relation to articles of commerce of undoubted value and acceptability to the consumer. The validity of the federal prohibition in each instance is supported by the consideration that the prohibition is in aid of the enforcement of state laws. Whether Congress might, without reference to state policy, establish a prohibition of commerce in the articles dealt with in each act is debatable in view of previous declarations of the Supreme Court. Finally, there is in both statutes the suggestion of a Congressional assent to the enactment of state laws which the states, in the absence of the federal act, could not make and enforce under their reserved powers.

Vigorous enforcement of the Connally Act has been limited to the East Texas field. Several cases relative to its constitutionality and meaning have arisen, but there has been as yet no pronouncement by the Supreme Court directly on this issue. The one case brought before that body merely raised a point concerning its applicability.<sup>94</sup> In all cases involving the question of constitutionality lower courts have given the act judicial approval.<sup>95</sup> The fact that it seeks simply to render aid in the enforcement of valid state laws would seem to constitute an answer to objections that the federal prohibition runs counter to the principles followed by the Supreme Court in the *First Child Labor Case*. There is no attempt by Congress to employ the commerce power to interfere with state policies in relation to production, which had proved to be a fatal defect in the Child Labor Law. As has been seen, the "innocent" character of goods involved in a somewhat similar prohibition in the Dyer Act did not lead to condemnation of a federal prohibition of commerce in useful and vendable commodities. The same consideration would doubtless be ineffective to render the Connally Act unconstitutional.

Resort to the federal statute has not been necessary to justify the validity of the state laws and regulations respecting the production and withdrawal from storage of petroleum and petroleum

<sup>94</sup> *United States v. Powers*, 307 U. S. 214 (1939), see *supra*, p. 327, note 88.

<sup>95</sup> *Griswold v. The President*, 82 F. (2d) 922 (C. C. A., Fifth) (1936); *United States v. Artex Refinery Sales Corp.*, 11 F. Supp. 189 (S. D. Tex.) (1935); *Panama Refining Co. v. Railroad Commission*, 16 F. Supp. 289 (W. D. Tex.) (1936); *Hurley v. Federal Tender Board No. 1*, 108 F. (2d) 574 (C. C. A., Fifth) (1939).

products to which the statute has reference. The authority of the states to set up a system of production control by proration among producers had been upheld by the Supreme Court before the passage of the Connally Act.<sup>96</sup> Regulation of transportation and storage by a state, even where interstate shipments are concerned, has been held essential to the enforcement of such a system of production control.<sup>97</sup> State control over transportation involves the issue of regulation of exports, however, since it might conceivably be carried to the point where discrimination against out-of-state interests can be shown. No state has attempted to set up an embargo against the export of oil, or to discriminate deliberately against the interstate market in favor of local consumers. If states should attempt to regulate exportation of oil in this fashion it is uncertain whether the Connally Act would be held to give Congressional approval to their measures. To so hold would involve setting aside earlier rulings by the Supreme Court declaring invalid state laws relating to mineral resources providing for preferential treatment of the local market.<sup>98</sup> It is unlikely that such a construction would be given the federal statute.<sup>99</sup>

<sup>96</sup> *Champlin Refining Co. v. Corporation Commission*, 286 U. S. 210, 235 (1932). See also *Texas v. Donoghue*, 302 U. S. 284 (1937).

<sup>97</sup> *Hercules Oil Co. v. Thompson*, 10 F. Supp. 988 (W. D. Tex.) (1935); *Melton v. Railroad Commission*, 10 F. Supp. 984 (W. D. Tex.) (1935); *Atlas Pipe Line Co. v. Sterling*, 4 F. Supp. 441 (E. D. Tex.) (1933).

<sup>98</sup> *West v. Kansas Natural Gas Co.*, 221 U. S. 229 (1911); *Pennsylvania v. West Virginia*, 262 U. S. 553 (1923). The ruling in *Hurley v. Federal Tender Board No. 1*, 108 F. (2d) 574 (C. C. A., Fifth) (1939), should be noted in connection with the matter of preferential treatment of the local market. In this case it was held that the Connally Act was applicable in prohibiting the shipment of illegally produced oil from Texas. The oil in question had been confiscated by the state and sold by it to a local dealer. The court held that the fact of legal ownership under the laws of the state did not operate to relax the explicit provisions of the federal regulation. This ruling, in effect, sanctions a state discrimination against interstate commerce. Illegally produced oil can be made lawful property through the process of state condemnation and sale to a private owner, and that property can be disposed of in the local market, but not in the interstate market. Nevertheless, it is difficult to see how a different ruling could have been made. If the state can authorize the sale of illegally produced oil in interstate commerce by legalizing possession through condemnation and sale, it can modify the terms of an act of Congress.

<sup>99</sup> In *Melton v. Railroad Commission* (see *supra*, note 97) the court observed by way of *dictum* that a state might not carry its control over transportation to the point of establishing a complete embargo upon the export of oil. The Court made this observation without reference to the Connally Act.

The Connally Act has proved to be administratively sound.<sup>100</sup> Objection has been made to it on the ground that it tends to favor a plan of production and marketing control in the interest of producers rather than in the interest of present and future consumers. Certain small independent producers have also complained that the federal act, in conjunction with state production control measures, tends to favor the large producers.<sup>101</sup> As the point becomes clearer to the public and to Congress that an intelligent and far-sighted oil-conservation policy must be founded on the needs of the nation rather than the interests of the producers and distributors, the present policy of state control, reinforced by federal action under the commerce power, may well give way to a comprehensive national conservation policy.<sup>102</sup> If this occurs the Connally Act will have proved to be only a temporizing expedient. Nevertheless, the act will have been an important milestone in the development of the theory of federal-state relations under the commerce clause. This statute gives concrete expression to the broad principle that the federal government may come to the aid of states by denying to violators of their production-control measures access to outside markets. The possibilities of making use of the device of coöperative legislation in this manner are as extensive as production for the interstate and foreign market.

#### 5. THE SIGNIFICANCE OF REGULATION BY CONDITIONAL PROHIBITION

THE conditional-prohibition method of regulating commerce has almost limitless potentialities. By employment of this regulative technique the national authority may be used effectively to support state policies in a wide field. Whenever consummation of a violation of any state law involves a movement either into or out of the state this method of regulation may be resorted to by the federal government to give assistance in preventing or punishing

<sup>100</sup> See *Hearings on S. 790 and H. R. 5366* (the bill to extend the duration of the Connally Act to 1939), Subcommittee of the Senate Finance Committee, 75th Cong., 1st Sess., April 27-29, 1937, pp. 4-12, 28-46.

<sup>101</sup> *Ibid.*, *passim*, and *Hearings on S. 1302, H. R. 4547, and H. R. 2308*, Subcommittee of the House Committee on Interstate and Foreign Commerce, 76th Cong., 1st Sess., April 26-28, 1939.

<sup>102</sup> Cf. Northcutt Ely, "The Conservation of Oil," 51 *Harvard Law Rev.* 1209, 1240 (May, 1938).

such violation. The federal government stands as a policeman at the state's borders, ready to deny egress or ingress when the effect would be to facilitate the breaking of local laws. The potential range of effectiveness of a state's laws is made coextensive with the jurisdiction of the United States over interstate and foreign commerce.

The validation of the Ashurst-Sumners Act by the Supreme Court has seemed to many commentators to herald the beginning of a new era in the relationship of the national government and the states in the regulation of labor problems and business practices generally. This decision apparently permitted a measure of federal control over those aspects of interstate commerce which had been held in *Hammer v. Dagenhart* and *Schechter v. United States* to lie outside the scope of federal regulatory authority. Protection of business and labor in destination states against competition from other states was made possible. The advantages claimed for the conditional-prohibition form of federal regulation as opposed to the imposition of federal standards directly are: (1) conditional prohibition for the protection of states of destination preserves for these states freedom to regulate matters of economic and social concern unhampered by the threat of unfair, destructive competition from other states with lower standards; (2) it allays the fear of centralization of authority in the national government; (3) it makes possible the adoption, by local initiative, of a policy of regulation adjusted to the particular circumstances and public opinion in each state; (4) it permits a certain degree of federal control in fields where Congress could not otherwise operate without amendment of the Constitution.<sup>103</sup> The conditional-prohibition method has been hailed as a "two-plane" system of regulation, in accordance with which "lower-standard and higher-standard states

<sup>103</sup> A. R. Himbert and F. F. Stone, "Congressional Assistance to the States under the Commerce Power," 9 *Rocky Mountain Law Rev.* 101 (Feb., 1937). For other discussions in which the possibility of extension of this mode of regulation is regarded with favor see F. D. G. Ribble, "National and State Cooperation under the Commerce Clause," 37 *Columbia Law Rev.* 43 (Jan., 1937); Frank R. Strong, "Cooperative Federalism," 23 *Iowa Law Rev.* 459 (May, 1938), Jane Perry Clark, "Federal-State Cooperation in Labor Legislation," 27 *American Labor Legislation Rev.* 167 (Dec., 1937); John A. Chambliss, "Constitutional Code Control," 30 *Illinois Law Rev.* 829 (March, 1936); Louis W. Koenig, "Federal and State Cooperation under the Constitution," 36 *Michigan Law Rev.* 752 (March, 1938); "An Important Suggestion," 8 *State Government* 152 (July, 1935).

are enabled to work out their economic destiny each protected from the other." <sup>104</sup>

It may be readily conceded that the system of coöperative regulation has merit in those instances where the federal government employs it to render assistance to the states in matters over which the national government has no direct control. Such regulation may well be adopted in preference to direct regulation even where Congress may act independently of the states, if sharp differences of opinion exist from state to state on the propriety of prohibiting commerce in a particular commodity. Yet there are obvious practical limits to the use of this regulative technique. It should not be pushed to the point where responsibility for the enforcement of local laws comes to rest primarily in the hands of the national government. Nor should it be employed to such an extent that the nation's commerce is subjected on every side to a regime of state-initiated regulation.

National unanimity of opinion on restriction of commerce in a given subject matter rarely exists. Certainly a system of regulation by conditional prohibition should not be used in every instance where there are local differences of opinion on the standards which business should be required to meet. Recent experience has demonstrated that the states are not free from those local jealousies and rivalries which were responsible in 1787 for the transfer of control over interstate and foreign commerce to Congress. They are prone to employ their taxation and police powers to set up a protective wall around their own industries and other interests at the expense of other states.<sup>105</sup> A deliberate adoption of a conditional-prohibition policy of regulation where direct federal regulation may be had instead tends to encourage a revival of the evils which the commerce clause was designed to eliminate. A policy which subjects commerce to a regime of state laws must have strong reasons to justify it in any given instance.

<sup>104</sup> Strong, *op cit*, p 512

<sup>105</sup> Cf. Frederick E. Melder, *State and Local Barriers to Interstate Commerce in the United States*, University of Maine Studies, Second Series, No 43 (1937); John B. Cheadle, "Cooperation in Reverse: A Natural State Tendency," 23 *Iowa Law Rev.* 586 (May, 1938); James Harvey Rogers, "From States Rights to State Autarchy," 177 *Harpers* 646 (Nov., 1938), Marketing Laws Survey, *Comparative Charts of State Statutes Illustrating Barriers to Trade between States* (1939); George R. Taylor, Edgar L. Burtis, and Frederick V. Waugh, *Barriers to Internal Trade in Farm Products* (Bureau of Agricultural Economics, 1939).

Another point should be noted also. Constitutional barriers have not yet been completely swept aside in reference to federal regulation of business and labor conditions by the method employed in the Ashurst-Sumners Act. Obstacles may be interposed to restrain Congress in the use of this regulative device. There is, first of all, the difficulty raised by the ruling in *Hammer v. Dagenhart*. If the Supreme Court should hold that Congress has no authority to prohibit directly commerce in goods made by underpaid, exploited workers, then in order to sustain a regulation of such commerce by conditional prohibition a distinction will have to be made between a federal interference in the internal affairs of a sending state by a direct federal prohibition of commerce and a similar interference through a conditional prohibition. Such a distinction will be difficult to make. The difference between the two forms of federal regulation is merely a matter of degree, not of kind. A state is no more competent to interfere in the internal affairs of another state than is Congress. The reserved powers of one state are as much a restriction on the powers of another state as they are upon the powers of Congress. It is difficult to see why the fact that the objective of a federal prohibition of commerce is to prevent violation of the laws of a destination state should give it validity when a direct federal prohibition of such commerce would be invalid. Congress would seem to have no more authority to interfere with Kentucky's internal economy in order to give protection to the laborers and businessmen of other states having higher labor standards, than it has to interfere for the benefit of laborers and businessmen in whatever state they happen to reside.<sup>108</sup> Federal laws operate upon persons, not states. They gain

<sup>108</sup> Cf. Edward S. Corwin, *Court over Constitution* (1938), Chap. III, and "National-State Cooperation—Its Present Possibilities," 46 *Yale Law Jl.* 599, 614 (Feb., 1937). Strong, *op. cit.*, p. 512, in his defense of this new technique of regulation, says on this point:

"While it is true that federal consent legislation involves a form of coercion of producing states, both economically and politically, it is far different from the coercion pregnant in the other type of federal legislation. The latter operates to place all the states on a uniform plane under which there is no room for deviation; the former, on the other hand, operates to create a two-plane system in which lower-standard and higher-standard states are enabled to work out their economic destiny each protected from the other. Two distinct economic currents are induced; the higher-standard states share commercial intercourse on one plane of competition legally protected from the lower-standard jurisdictions which in turn function on their own plane, economically protected from the 'fairer' competition....

"The distinction between the two major types of federal action, then, far

no additional authority by reason of the fact that they coincide in purpose with the laws of some states. If Congress can prohibit commerce conditionally, it must be able to prohibit that same commerce without reference to state policies dealing with the subject.

Still other distinctions will have to be made by the Court. It will have to qualify its holding in *United States v. Hill* that "the control of Congress over interstate commerce is not to be limited by state laws."<sup>107</sup> To hold that Congress possesses power to prohibit commerce in a given commodity only to the extent that commerce is carried on in violation of state law establishes such a limitation. There is also the sweeping declaration in *United States v. Constantine* disavowing the "startling" doctrine that Congress may by its laws impose penalties for infractions of state laws<sup>108</sup> This statement stands as an indictment of a federal ban upon the shipment of goods into a state with the intent to violate its laws, when Congress cannot prohibit that commerce independently of state policy.

Aside from the point of constitutionality and the availability of methods of direct independent regulation by Congress, there are administrative problems involved which appear to be insuperable. The states have as yet no adequate system of border patrol and inspection. In recent years "port-of-entry" laws have been passed in a number of states to facilitate the administration of their motor-vehicle and quarantine regulations;<sup>109</sup> but this tendency to set up

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from being superficial, is the significant difference between legislation forcing national uniformity and that which leaves open to the individual states, protected to an extent commensurate with the degree of general acceptance of the alternatives open, a choice of policy on matters which precipitate differences of opinion and viewpoint."

There are two criticisms which may be made here. In the first place direct federal prohibition of commerce in a given article does not "place all the states on a uniform plane under which there is no room for deviation." So far as production for the local market is concerned, producers may pursue whatever policy the state permits; Congress merely denies to them a right of entry to the interstate market. This point was well stated by Justice Holmes in his dissent in the *First Child Labor Case*. In the second place, the conditional-prohibition plan may operate to create not a "two-plane" system but a "forty-eight-plane" system if state laws are sufficiently diverse. This fact is recognized at a later point in the article quoted.

<sup>107</sup> *United States v. Hill*, 248 U. S. 420, 427 (1919)

<sup>108</sup> *United States v. Constantine*, 296 U. S. 287, 296 (1935). Strong, *op. cit.*, p. 514, characterizes this ruling as a "judicial lapse" in applying the theory of cooperative federalism.

<sup>109</sup> Melder, *op. cit.*, pp. 75-78; "Port of Entry Laws," *United States News*, Feb. 7, 1938.



barriers to trade at state borders is rightly deplored. An extensive use of the conditional-prohibition mode of regulation would give impetus to this movement. An equally undesirable alternative would be the establishment of a system of federal administrative agencies at state boundaries or at main points of reception. A comprehensive organization for federal inspection and certification of shipments at the point of delivery to the carrier or at the places of production would be required. Administratively, the conditional-prohibition method of regulation is more complex than uniform direct federal regulation.

An unsuccessful attempt was made in Congress in 1937 to carry out the numerous suggestions that the Ashurst-Sumners plan of regulation might be applied to commerce in goods produced under substandard labor conditions. Judicial validation of that law released a flood of bills in both the House and Senate proposing to deal in similar manner with the general problems of minimum wages, maximum hours, collective bargaining, and the employment of minors. The proposals to regulate general labor conditions in this manner failed of consideration; but a bill to regulate child labor through this approach was considered and eventually passed by the Senate. It acquired support from an unexpected quarter. With the necessary number of states to ratify the Child Labor Amendment rapidly nearing realization, opponents of the proposed amendment embraced the conditional-prohibition method of regulation as the lesser of two evils and gave active support to it.<sup>110</sup> They believed the passage of a federal law of this character would tend to stall the movement for ratification of the Child Labor Amendment, which would authorize the establishment of a more stringent form of federal regulation.

<sup>110</sup> See Tom Ireland, *Child Labor as a Relic of the Dark Ages* (1937), Chap. XIII; *Hearings on S. 592, S. 1796, etc.*, Senate Committee on Interstate Commerce, 75th Cong., 1st Sess., May 12-18, 1937. Among the organizations favoring the "prison-made goods approach" in the regulation of child labor were the American Bar Association, the National Committee for the Protection of Child, Family and School, and the National Manufacturers Association, all of them agencies which have conducted an active fight against ratification of the Child Labor Amendment.

Three state legislatures which refused to ratify the Child Labor Amendment sought to speed the adoption of a state-aid measure in Congress by enacting laws barring the sale of child-made goods within their borders. *Missouri Laws*, 1937, p. 196; *Vermont Acts and Resolves*, 1937, No. 176, sec. 8; 19 *McKinney's Consolidated Laws of New York*, secs. 69a-69d (1938 Supp.).

A struggle between advocates of this form of regulation and advocates of direct federal regulation through the commerce power was precipitated with the advancement of the Black-Connery Fair Labor Standards Bill for consideration by the Senate. Administration leaders favored the inclusion in this bill of child-labor provisions modeled upon the lines of the Keating-Owen Act of 1916 which the Supreme Court had invalidated in *Hammer v. Dagenhart*. Before committee action could be obtained upon the Black-Connery Bill, Senator Wheeler, of Montana, and Senator Johnson, of Colorado, took steps to have reported out from the Senate Committee on Interstate Commerce a child-labor bill embodying the conditional-prohibition method of regulation.

The reported bill represented a combination of methods of regulation.<sup>111</sup> It proposed to deal with child-made goods in interstate commerce in four ways: (1) all such goods, as defined in the bill, were to be subjected to the operation of the laws of the state of destination, according to the Hawes-Cooper Act formula; (2) the introduction of such goods into a state in violation of its laws was prohibited, in accordance with the formula of regulation used in the Ashurst-Sumners Act; (3) all packages of child-labor goods were required to be labeled to show their child-made character; and (4) the shipment in interstate commerce of any goods in the production of which child labor had been employed was prohibited. Employment of children in a factory within six months prior to shipment of goods from it was declared to be presumptive, but not conclusive, evidence that child labor had been employed in their manufacture.<sup>112</sup>

<sup>111</sup> *S. Rept.* 726, on S. 2226, 75th Cong., 1st Sess.

<sup>112</sup> In reporting this bill the committee rejected one (S 2345) introduced by Senator Barkley, of Kentucky, which represented the administration's views on child-labor legislation. The Barkley Bill was practically a proposal to reenact the Keating-Owen Act of 1916. It applied the so-called "factory quarantine" method of prohibiting shipment of child-labor goods, a method which had been proved to be easily administered and was effective, according to statements of the earlier act's administrators in hearings. See *Hearings on S. 592, S. 1976, etc.*, Senate Committee on Interstate Commerce, 75th Cong., 1st Sess., May 12-18, 1937, pp 55-59. The direct prohibition proposed in the Wheeler-Johnson Bill was quite different in that the federal prohibition applied only to goods upon which it could be shown that child labor had been employed, rather than to any goods produced in a plant employing child labor. Convictions under it would have been more difficult to obtain. An excellent analysis of the Wheeler-Johnson Bill provisions and those eventually enacted in the Fair Labor Standards Act is given by Abraham C. Wienfeld in "The Legal Aspects of the Child-Labor

The main argument advanced in favor of the Wheeler-Johnson Bill was that it was a "safe" measure; that is, if the direct-prohibition feature should be held unconstitutional the other methods of regulation—divestment, conditional prohibition, and labeling—would still stand. These provisions of the proposed act were made separable. The question of the constitutionality of these latter forms of regulation was regarded as practically settled by the *Kentucky Whip and Collar* decision on the Ashurst-Sumners Act and the *Whitfield* decision on the Hawes-Cooper Act.<sup>113</sup>

The constitutionality of the divestment, conditional-prohibition, and labeling features of the bill was not disputed by its critics. They pointed out that the direct-prohibition provision, since it required furnishing proof in every instance that child labor had been employed on each article banned from interstate commerce, would be difficult to enforce, even if it should be upheld on the point of constitutionality. If it should fail to be upheld there would be left only the other relatively ineffective modes of regulation. They contended that it would be preferable to make a frontal assault on the *Hammer v. Dagenhart* ruling by passing an act similar to the one held void in that case. If the act was declared unconstitutional by the Supreme Court, the reaction would probably supply the necessary impetus to bring about ratification of the Child Labor Amendment.

Administration leaders succeeded in preventing the Wheeler-Johnson Bill from coming up for consideration before the Fair Labor Standards Bill was reported out of committee. When that bill was reported it contained a plan of regulating commerce in child-labor goods similar to that of the earlier Keating-Owen Act.<sup>114</sup> With the aid of opponents of general wage-and-hour regulation, however, Senators Wheeler and Johnson conducted a successful fight to have the Fair Labor Standards Bill amended in its child-labor provisions by substitution of the provisions of their own measure.<sup>115</sup> The Fair Labor Standards Bill went to the

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Provisions of the Senate and House Wage-Hour Bill," *Cong. Rec.*, 75th Cong., 3d Sess., App., pp. 2466-2469.

<sup>113</sup> See the remarks of Senator Johnson, of Colorado, *Cong. Rec.*, 75th Cong., 1st Sess., pp. 7664-7666.

<sup>114</sup> *S. Rept.* 884, on S 2475, 75th Cong., 1st Sess.

<sup>115</sup> *Cong. Rec.*, 75th Cong., 1st Sess., pp. 7663-7669, 7930-7931, 7951. The Wheeler-Johnson amendment was inserted in the bill in substitution for the committee's proposals by a vote of 57 to 28. All the senators who opposed the

House with the Wheeler-Johnson amendment provisions as its child-labor feature.

Administration supporters proved to be successful in the House in getting child-labor provisions to their own liking written into the Fair Labor Standards Bill. Provisions similar to those which had been written into the bill in committee in the Senate were reinserted and the Wheeler-Johnson amendment provisions deleted.<sup>116</sup> When the measure was eventually passed by the House, these child-labor features were retained.<sup>117</sup> They remained in the bill as enacted into law after going through conference.<sup>118</sup> Although the Senate passed the Wheeler-Johnson Bill in separate form shortly after the Fair Labor Standards Bill was sent to the House,<sup>119</sup> the House failed to take action upon it.

The child-labor provisions of the Fair Labor Standards Act thus present a direct challenge to the Supreme Court to reverse its stand in *Hammer v. Dagenhart*. Its reply to that challenge will undoubtedly dissipate some of the fog concerning the limitations on Congressional power to regulate commerce in goods produced under substandard labor conditions. If the Fair Labor Standards Act is sustained <sup>120</sup> the immediate pressure for more extended use of the conditional-prohibition method of regulating commerce will be relieved.

While there is undoubtedly a place for a limited use of the

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adoption of the Wheeler-Johnson amendment voted for the completed bill when it was up for final passage, *all* the 28 senators who voted against the bill on final passage supported the adoption of the Wheeler-Johnson amendment

<sup>116</sup> *H. Rept.* 1452, 75th Cong., 1st Sess.; *H. Rept.* 2182, 75th Cong., 3d Sess.

<sup>117</sup> Representative Martin, of Colorado, attempted to get an amendment inserted into the bill similar to the Wheeler-Johnson proposal, but was unsuccessful. *Cong. Rec.*, 75th Cong., 3d Sess., pp. 7398, 7401.

<sup>118</sup> Cf. Katherine Du Pie Lumpkin, "The Child Labor Provisions of the Fair Labor Standards Act," 6 *Law and Contemporary Problems* 391 (Summer, 1939).

<sup>119</sup> *Cong. Rec.*, 75th Cong., 1st Sess., pp. 9318, 9320. Administration supporters made no effort to prevent the bill's passage in the Senate.

<sup>120</sup> The provisions of the Fair Labor Standards Act barring from interstate commerce goods produced under substandard labor conditions were held constitutional in *United States v. Darby Lumber Co.*, 312 U. S. 100 (1941). *Hammer v. Dagenhart* was explicitly overruled. The position taken by the Court in the *Darby Lumber Company* case indicated that it would regard the power of Congress to prohibit commerce independently of state laws as coterminous with its power to prohibit commerce conditionally upon an intended or consummated violation of state laws. Hence the possibility of a constitutional restriction upon the power of Congress to use the conditional-prohibition technique of regulation (noted *supra*, p. 334) has been eliminated.

conditional-prohibition technique of regulation, its importance in the scheme of federal control will probably continue to be relatively small.<sup>121</sup> Experience in the past with this regulative device shows that it has generally been only a temporizing expedient, a prelude to independent regulation by Congress. This was so in the case of the slave trade. The regime of liquor control set up by the Reed Amendment did not prove to be permanent, as indicated by the adoption of the Eighteenth Amendment. Since repeal, as has been seen, effective federal aid to the states in preventing the illegal introduction of liquors has been wanting. The experiment with conditional prohibition of commerce in prison-made goods has not proved entirely satisfactory, as is revealed by the adoption of an act establishing absolute prohibition of the interstate movement of such goods. Early efforts toward aiding the states in the conservation of game by this method have been practically superseded by a system of direct federal control in game conservation. The state-aid method of dealing with the oil-conservation problem is admittedly a makeshift. State control ought to be and, no doubt, will be eventually succeeded by a plan of direct federal control when the importance of this nonreplaceable resource to our national industrial life and national defense is fully realized. Federal anticrime legislation under the commerce power has so far proved to be enforceable and helpful in the protection of life and property. In the forms of commerce to which federal anticrime laws apply, however, the commercial element is least noticeable and important. Conditional-prohibition legislation has been enacted to deal with these forms of commerce because it offers the only convenient avenue of approach available to the national government in dealing with crimes against life and property, rather than because of tender regard for varying state policies in reference to the "commerce" affected.

On the basis of past experience, therefore, the likelihood of a rapid and extensive adoption of conditional-prohibition statutes by Congress as a matter of deliberate choice seems rather remote. If

<sup>121</sup> In the Seventy-sixth Congress a conditional-prohibition bill (H. R. 989) applying to goods produced by persons employed under wage, health, safety, and sanitation standards lower than those of the destination state was introduced by Representative Keogh, of New York. Senator Guffey, of Pennsylvania, also introduced a measure of this type (S. 3711) applying to milk and milk products purchased at lower prices or handled or produced under standards less stringent than those of the destination state. Neither was reported out of committee.

the Court defines federal powers under the commerce clause narrowly, and, in respect to some phases of commerce, insists upon denying to Congress the right to choose any policy except that of no regulation or regulation only in support of state laws, this form of statutory regulation will necessarily come in for a much wider employment. There are probably some matters in regard to which this mode of regulation would be satisfactory and even preferable to direct federal control. But applied on a wide scale, federal regulation merely by supporting the laws of the states would lead to a legislative chaos destructive to the nation's commerce. Such conditions produced the Constitution and the commerce clause in 1787. An attempt to force interstate and foreign commerce to be governed in any large degree by the laws of the states rather than by uniform national laws might well produce in our own times a similar strong reaction in favor of centralization of authority.

## CHAPTER X

### FEDERAL ADOPTION OF STATE LAWS RELATING TO COMMERCE

THERE have been certain acts passed by Congress under its power to regulate commerce which, for want of a better descriptive term, can only be classified as "adoptions" of state laws. What constitutes an adoption of state law by federal act has never been made wholly clear by the courts. The meaning of the term is ill-defined. On occasion the various types of federal-state coöperative measures noted in the preceding pages have been referred to as "adoptive" laws. When Congress fails to act upon any subject matter falling within the range of concurrent federal and state jurisdiction it thereby indicates its will to leave the subject to be dealt with by the states, if at all. Its failure to exercise its authority has sometimes been considered tantamount to federal "adoption" of the permitted state regulations. The same characterization has at times been given to positive acts of Congress which permit a continuance of state regulation by a denial of an intent to remove particular subject matters completely from state control.<sup>1</sup>

The term is ordinarily used in a much narrower sense. As employed here "adoptive statute" denotes a positive act of Congress which has the effect of giving state statutes and local ordinances on a given subject, or administrative regulations thereunder, the force of federal law. This may be accomplished in various ways. A federal statute may impose an obligation upon

<sup>1</sup> Illustrations of this type of provision are found in the Act of July 3, 1866, sec. 5, 14 *Stat.* 81, 46 *United States Code* (1934), sec. 174, limiting the effect of a federal regulation of commerce in explosives so as to preserve state authority to deal with the same matter; and in the Act of April 13, 1926, 44 *Stat.* 250, 7 *United States Code* (1934), sec. 161, conceding authority to the states to establish plant quarantines in the face of a finding by the Supreme Court in *Oregon-Washington Railroad and Navigation Co. v. Washington*, 290 U. S. 87 (1926), that the terms of the Federal Plant Quarantine Act of 1912 impliedly denied such authority to the states. See *supra*, p. 148.

federal administrative officers to abide by local laws and to assist in their enforcement. Again, a federal statute may require general compliance with state criminal laws and local ordinances and enforce this requirement by penalties. In the latter case the state laws and local ordinances have been adopted as federal laws, in effect. In the former case, that is, where there is only an obligation imposed upon federal officers to respect state laws and local ordinances and to cooperate in their enforcement, the federal act may be considered an adoptive statute or it may be regarded only as a requirement of cooperation by federal administrative authorities with the officials of the states in carrying out local laws. The effect of either of these types of federal statute in providing for more effective enforcement of the local laws involved is evident.

The distinction between prohibitions of commerce conditioned upon violations of state law and adoptive legislation is not always a clear one. If a prohibition of commerce is conditioned upon the violation of a state law dealing with a matter beyond Congressional control, it is obvious that such a federal act could not properly be described as adoptive of the state laws to which it makes reference. The authority to adopt necessarily implies authority to enact the adopted legislation independently. Thus the federal prohibition of the shipment of illegally produced oil in interstate commerce could not be fairly conceived of as an adoption of state laws regulating the production of oil. The federal act denies an interstate or foreign market to the producer of such oil, but it does not attempt directly to make production in violation of the state law illegal. Likewise the federal act which makes illegal the shipment of prison-made goods into a state for the purpose of storage or sale in violation of state law does not adopt those state laws as federal acts in a direct sense. But where a federal prohibition of commerce is conditioned upon violation of a state law *regulating commerce* in a given subject matter—for example, a state law forbidding or restricting the *shipment* of game from a state, or one forbidding the *reception* of prison-made goods introduced from another state—the conditional prohibition is to all intents and purposes a federal adoption of the state statute. The federal statute not only impliedly gives consent to the enactment of the state laws involved, but by applying a sanction requires their observance.

Because federal conditional-prohibition statutes could thus be



considered as adoptive statutes only in part, they have been treated as a separate category of federal acts in the preceding chapters. The purpose here is to consider those federal statutes which have more commonly and more accurately been referred to as adoptive laws because they have reference exclusively to matters to which the commerce power of Congress could be extended independently of state laws. Statutes of this sort manifest an intention on the part of Congress not to exert its power over commerce independently, but rather to give to the laws of the states substantially the character of federal regulations of commerce.

The practice of incorporating state laws by reference into its own system of laws was begun by Congress at an early date. The range of subjects dealt with in this manner is quite extensive. By federal statute state laws have been adopted on such matters as the rules of decision in trials at common law in federal courts;<sup>2</sup> rules as to practice, pleadings, and forms and modes of proceedings in civil causes in federal courts, so far as they are not covered by federal statute;<sup>3</sup> qualifications and exemptions of federal jurors;<sup>4</sup> powers of federal peace officers (as applied to United States marshals);<sup>5</sup> the conduct of Congressional elections,<sup>6</sup> and the definition of offenses and punishments therefor in places subject to the exclusive jurisdiction of the United States, such as forts, dockyards, arsenals, federal military reservations, and parks.<sup>7</sup>

These and numerous other adoptive acts have given the federal courts opportunity to develop certain general principles regarding the construction of such statutes.<sup>8</sup> The question of delegation of legislative power to the states is involved in adoptive or incorporative legislation if a federal adoptive statute is construed to include within its scope laws yet to be enacted by the states, or if it contemplates modification or repeal of the adopted acts by state action. When state laws on a given matter are adopted as rules of federal

<sup>2</sup> 28 *United States Code* (1934), sec. 725.

<sup>3</sup> *Ibid.*, sec. 724.

<sup>4</sup> *Ibid.*, sec. 411.

<sup>5</sup> *Ibid.*, sec. 504.

<sup>6</sup> R. S. 5515 (1878).

<sup>7</sup> 18 *United States Code* (1934), sec. 468; 16 *United States Code* (1934), secs. 25, 59, 97, 117b, 126, 169, 196b, 204b, 575. State criminal laws apply in these areas only in regard to matters not covered by federal criminal statutes.

<sup>8</sup> For an analysis of decisions of federal courts involving adoptive statutes see James D. Barnett, "The Delegation of Legislative Power by Congress to the States," 2 *American Political Science Rev.* 347 (May, 1908).

action they become to all intents and purposes the federal law on those matters. No change in federal statutory law can be made except by Congress. Hence if Congress attempts to reach future modifications, repeals, or new enactments of the states by the original adoptive statute, it violates the principle that the federal legislative power may not be delegated to another jurisdiction.

This principle was recognized by the federal courts at an early date,<sup>9</sup> and has in the main been adhered to in cases involving federal adoptive acts. In some instances where a strict adherence to it would raise undue difficulties, however, the courts have either ignored it in giving effect to state legislation adopted prospectively; or they have advanced reasons for applying the rule provided by state laws independently of the adoptive federal statutes.<sup>10</sup> The readiness of federal courts to sustain federal adoptive statutes and even to give them a prospective application stands in sharp contrast to the attitude of state courts in cases involving similar state statutes adopting federal laws or administrative regulations by reference. Special considerations are involved in state adoption of federal statutes, either prospectively or otherwise, owing to specific provisions found in many state constitutions limiting the authority of

<sup>9</sup> *Wayman v Southard*, 10 Wheat 1, 48 (U. S.) (1825), *per* Chief Justice Marshall "The States assemblies do not constitute a legislative body for the Union. They possess no portion of that legislative power which the constitution vests in Congress, and cannot receive it by delegation . . . This [34th] section [of the Judiciary Act of 1789, making state laws govern as to rules of decision in cases at law in federal courts] is unquestionably prospective, as well as retrospective. It regards future, as well as existing laws. If, then, . . . it adopts future States laws to regulate the conduct of an officer in the performance of his official duties, it delegates to the State Legislatures the power which the constitution has conferred on Congress, and which, gentlemen say, is incapable of delegation."

*United States v Knight*, 26 F. Cas. 793, 797 (No. 15,539) (Cir. Ct., D. Me.) (1838), *per* Justice Story "I must confess, that I entertain very serious doubts, whether Congress does possess a constitutional authority to adopt prospectively State legislation on any given subject; for that, it seems to me, would amount to a delegation of its own legislative power."

<sup>10</sup> See Barnett, *op. cit.*, pp. 362 ff., for illustrative cases. The courts have been most consistent in refusing to allow a prospective operation to federal laws adopting state criminal statutes for places subject to the exclusive jurisdiction of the United States. See *United States v. Paul*, 6 Peters 141 (U. S.) (1831); *Franklin v. United States*, 216 U. S. 559 (1910), *United States v. Press Publishing Co.*, 219 U. S. 1 (1911); *Hollister v. United States*, 145 U. S. 773 (1906). As a result Congress has been forced from time to time to reenact the general statute on this point, in order to include changes in state laws made since the previous federal adoptive statute was passed.

the legislature to incorporate legislation by reference. Nevertheless, state courts, even in the absence of such restrictions, have generally refused to sanction an adoption of federal laws prospectively when the issue of delegation of power to another jurisdiction has been raised.<sup>11</sup>

In the sphere of commercial regulation federal acts which have sought to adopt state laws as a part of a system of federal regulations have not been numerous. Acts which bear in some degree the earmarks of adoptive statutes have been passed in relation to pilotage, quarantines, the slave trade, and intoxicating liquors. Two acts were passed by Congress in an attempt to adopt state workmen's compensation for the benefit of longshoremen. They were overthrown by the Supreme Court on the ground that they were attempts to delegate legislative power to the states unconstitutionally. These acts were passed under the authority of Congress to modify the rules of maritime law rather than under its power to regulate commerce; but their subject matter has such a close bearing upon commercial activities that they are considered here. Federal acts of an adoptive character passed under the commerce power have successfully withstood the constitutional test in those cases where their validity has been questioned. Not all of them have been considered by the courts.

The validity of some of these federal adoptive acts relating to commerce remains somewhat doubtful in view of the general prin-

<sup>11</sup> On the general subject see Elwyn A. King, "State Constitutions Forbidding Incorporation by Reference," 16 *Brooklyn Law Rev* 625 (June, 1936); Richard A. Tilden, "Incorporation by Reference of Federal Recovery Laws and Administrative Regulations in State Acts," 3 *George Washington Law Rev.* 482 (May, 1935); John W. Brabner-Smith, "Incorporation by Reference and Delegation of Power," 5 *George Washington Law Rev* 198 (Jan., 1937); and Paul G. Kauper, "Validity of State Recovery Acts Adopting Federal Codes," 33 *Michigan Law Rev.* 597 (Feb., 1935). Recent state cases of note in which adoptive statutes intended to have a prospective operation were held invalid as constituting delegations of state legislative power to federal authorities include *In re Opinion of the Justices*, 239 Mass. 606, 133 N. E. 453 (1921) (proposed Massachusetts prohibition law conforming definition of intoxicating liquors to definition made in federal statutes and court decisions invalid); *In re Intoxicating Liquors*, 121 Me. 438, 117 Atl. 588 (1922), and *State v. Gauthier*, 121 Me. 522, 118 Atl. 380 (1922) (similar Maine law invalid); *Darweger v. Staats*, 267 N. Y. 290, 197 N. E. 61 (1935) (New York law adopting provisions of federal NRA codes for governance of local industry invalid); *Charles Uhden, Inc. v. Greenough*, 181 Wash. 412, 43 Pac. (2d) 983 (1935) (Washington statute causing state price and marketing regulations of agricultural products to conform to regulations made by the United States Secretary of Agriculture invalid).

ciples which the Court has endorsed in cases involving adoptive statutes in other fields. It is possible that the courts would not consider them adoptive legislation if confronted with the question of their constitutionality. They might be regarded as measures merely in aid of the enforcement of state laws, or, as in the case of the 1789 pilotage act, as measures recognizing state authority to legislate upon the subjects in question. Whether regarded as adoptive legislation or not, these federal acts have at any rate been instrumental in some degree in extending state power or influence in the regulation of foreign and interstate commerce. They demonstrate a willingness on the part of Congress to coordinate federal regulations of commerce with regulations made by the states.

### 1. QUARANTINE AND HEALTH LAWS

THE field of quarantine and health legislation offers the earliest, and perhaps the clearest, illustration of the employment of the federal commerce power to achieve an adoption of state laws as federal regulations of commerce. For nearly a century following the formation of the Constitution the protection of public health through the establishment of quarantines was left entirely to the states. Congress was deterred from establishing a system of federal quarantine during this period not only by a belief that state regulations were adequate, but also by a widely held opinion that power was lacking in Congress to establish quarantine regulations contrary to provisions of state law. The authority of Congress to legislate on this subject in any degree was questioned by many. Numerous acts passed by Congress in the early years giving federal assent to the levy of tonnage duties by the states to enable them to maintain health officers or marine hospitals in their ports were indicative of Congressional acquiescence in state control over the subject of quarantines and other health measures.<sup>12</sup>

In 1795 health authorities of New York City were confronted by a serious yellow-fever epidemic. It developed that by reason of provisions in federal customs laws and regulations vessels arriving from foreign ports were unable to comply with the local quarantine regulations adopted to deal with the situation. Governor Jay brought the matter to the attention of the President, urging

<sup>12</sup> For permissive acts of this nature see 1 *Stat.* 393, 546; 2 *Stat.* 103, 316, 549, 658, 820; 3 *Stat.* 331, 417, 683.

action by Congress which would eliminate the conflict between federal and local regulations and permit adequate protective measures to be taken by local authorities.<sup>13</sup> Soon afterward a bill authorizing the President "to require such quarantine as he should deem necessary on vessels arriving from foreign ports" was introduced in Congress.<sup>14</sup> Doubts concerning the power of Congress to authorize the establishment of quarantine regulations contrary to those of the states were entertained by many members of Congress.<sup>15</sup> Accordingly, the measure which was finally passed was directed toward giving assistance to the states in the enforcement of measures they might provide, rather than toward the creation of an independent system of federal quarantine.

The resulting act<sup>16</sup> in brief terms authorized the President to "direct the revenue officers, and the officers commanding forts and revenue cutters, to aid in the execution of quarantine, and also in the execution of the health laws of the States, respectively, in such manner as to him may appear necessary." It was not an adoption of state quarantine measures, but rather an authorization of federal administrative cooperation to assist state authorities in carrying out their duties. The particular coöperative procedures to be employed were left to be prescribed by executive order.

A reappearance of yellow fever in certain Atlantic ports led to the passage of a more comprehensive statute in 1799. The earlier act was repealed. The new act<sup>17</sup> contemplated an even closer coöperation with the states by an intermeshing of federal revenue regulations with local health laws. The first section of the 1799 act made compliance with state quarantine laws obligatory upon federal revenue officers, leaving no leeway for administrative discretion in the matter. It also instructed them to give aid in the enforcement of such laws.<sup>18</sup> In other words, their duties and

<sup>13</sup> An account of the circumstances giving rise to the passage of the act is set forth in the argument of counsel before the Supreme Court in *The Passenger Cases*, 7 How. 283, 299, 340 (U. S.) (1849); also in W. H. Cowles, "State Quarantine Laws and the Federal Constitution," 25 *American Law Rev.* 45, 63 (Jan.-Feb.) (1891).

<sup>14</sup> *Annals of Cong.*, 4th Cong., p. 1228.

<sup>15</sup> *Ibid.*, pp. 1348-1360.

<sup>16</sup> Act of May 27, 1796, 1 *Stat.* 474.

<sup>17</sup> Act of Feb. 25, 1799, 1 *Stat.* 619. The measure was considered only in brief fashion in Congress. See *Annals of Congress*, 5th Cong., pp. 2753, 2792-2796.

<sup>18</sup> Its significant parts were as follows: "Quarantines and other restraints, which shall be required and established by the health laws of any State, or pur-

obligations were to be governed by the terms of state laws, as well as by national laws and regulations. Other provisions looked toward the formulation of regulations by the Secretary of the Treasury which would avoid conflict with local measures governing the unloading of vessels.

The first section of the 1799 law has been carried forward and is still in effect.<sup>19</sup> Although this provision has been dealt with in *dicta* of the Supreme Court from time to time its validity has never been called into question and the construction which that Court would place upon it has never been made wholly clear. It has been cited as a "recognition" or "confirmation" of state power to establish quarantines for vessels in interstate and foreign commerce.<sup>20</sup> Chief Justice Marshall referred to it as "sanctioning" state quarantines upon such vessels.<sup>21</sup> It has been described as an act requiring United States officers to "conform" to the provisions of state quarantine laws and regulations,<sup>22</sup> and causing federal customs regulations to "conform" to state quarantine laws.<sup>23</sup> Language indicative of an adoptive construction of the act has also been employed by a member of the Supreme Court.<sup>24</sup>

suant thereto, respecting any vessels arriving in or bound to, any port or district thereof . . . shall be duly observed by the collectors and all other officers of the revenue of the United States . . . and all such officers of the United States shall be, and they hereby are, authorized, and required, faithfully to aid in the execution of such quarantines and health laws, according to their respective powers and precincts, and as they shall be directed, from time to time, by the Secretary of the Treasury of the United States . . . But nothing in this act shall enable any State to collect a duty of tonnage or impost without the consent of Congress." 1 Stat. 619.

<sup>19</sup> 42 *United States Code* (1934), sec. 97. By an Act of July 13, 1832, 4 Stat. 577, the Secretary of the Treasury was authorized for a limited time to detail additional revenue cutters for the purpose of aiding the states in the execution of their quarantine and health laws. On May 26, 1866, a joint resolution (14 Stat. 357) empowered the Secretary of the Treasury to make and carry into effect such orders and regulations as he deemed necessary to aid state and municipal authorities in combating the introduction of cholera.

<sup>20</sup> *Morgan's, etc., S. S. Co. v. Louisiana State Board of Health*, 118 U. S. 455, 464 (1886), *per* Justice Miller; *Barlett v. Lockwood*, 160 U. S. 357 (1896), *per* Justice Brown, *Compagnie Française de Navigation, etc. v. Louisiana State Board of Health*, 186 U. S. 380, 387 (1902), *per* Justice White; *New York v. Miln*, 11 Pet. 102, 142 (U. S.) (1837), *per* Justice Barbour. See also *Minneapolis, St. P., etc., Ry. Co. v. Milner*, 57 F. 276, 278 (Cir. Ct., W. D. Mich.) (1893).

<sup>21</sup> *Brown v. Maryland*, 12 Wheat. 419, 444 (U. S.) (1827).

<sup>22</sup> *Morgan's, etc., S. S. Co. v. Louisiana State Board of Health*, 118 U. S. 455, 464 (1886).

<sup>23</sup> 2 *Ops. Atty. Gen.* 263, 264 (1829).

<sup>24</sup> *The Passenger Cases*, 7 How. 283, 424 (U. S.) (1849), concurring opinion of Justice Wayne.

Under the 1799 statute there was no provision for enforcement of penalties against violators of state quarantine laws. The act did not go so far as to adopt the penalties prescribed by state laws and make them enforceable by federal courts, nor were the penalty provisions of any other federal law applicable against violators. Nevertheless, it does not appear inappropriate to term this federal statute an adoptive law. It clearly had a prospective force, having reference to state enactments yet to be formulated as well as to those in existence at the time of its passage.<sup>25</sup> If its effect was to bind federal officers to conform to state regulations, these regulations were given the force of enactments supplementary to those of Congress in the revenue laws. A concession of authority to the states and local governments to prescribe regulations governing the actions of federal officers in the performance of their duties is tantamount to an adoption of their regulations to that extent.<sup>26</sup> In a debate in the Senate on a later quarantine measure the 1799 statute was characterized as an adoptive statute, and no attempt was made to question this view of it.<sup>27</sup> Yet no explanation was offered, either in Congress or the courts, to show how Congress might adopt prospectively the laws of states and localities without delegating its own legislative authority to them.

In a series of acts passed in the period between 1878 and 1893 the foundations of the present system of national quarantine administration were laid. Lingering doubts concerning the power of Congress to set up an independent system of quarantine, as well as considerations of expediency, caused the measures formulated to assume a state-federal coöperative character. Although the part played by the state and local governments in quarantine matters has gradually declined in importance as the scope of activity of federal authorities has widened,<sup>28</sup> the national laws now in force

<sup>25</sup> *Morgan's, etc., S. S. Co. v. Louisiana State Board of Health*, 118 U. S. 455, 464 (1886).

<sup>26</sup> Cf. the statement of Justice Thompson in *United States v. Halstead*, 10 Pet. 51, 63 (U. S.) (1835): "An officer of the United States cannot, in the discharge of his duty, be governed and controlled by state laws, any farther than such laws have been adopted and sanctioned by the legislative authority of the United States."

<sup>27</sup> See the remarks of Senator Lamar, of Mississippi, later a member of the Supreme Court, *Cong. Rec.*, 46th Cong., 1st Sess., p. 1547.

<sup>28</sup> Beginning in 1893, provision was made in federal acts for the acquisition of state quarantine stations by the federal government. By 1921 all local quarantine stations had been taken over by the National Public Health Service. See James A. Tobey, *The National Government and Public Health* (1926), p. 24.

still recognize the state-federal coöperative principle in quarantine and health administration in our ports of entry.

Absorption of local systems of control into a combined state-national system was achieved by the inclusion of provisions of an adoptive character in successive federal statutes enacted between 1878 and 1893. An examination of the circumstances leading to the passage of the several federal acts which provide the basis for the present system of control is unnecessary to an analysis of the provisions of an adoptive character still operative.<sup>29</sup> These provisions overlap somewhat, but their total effect is to require federal enforcement of state and local quarantine and health measures applicable to vessels moving in foreign commerce, provided there is no conflict with federal regulations.

An analysis of the statutes now in force discloses the following provisions: (1) vessels or vehicles coming from any foreign port or country where any contagious or infectious disease exists, and vessels conveying persons, merchandise, or animals bearing infectious or contagious disease, in entering American ports or crossing the boundary line of the United States must comply with the quarantine laws of the states through which they may pass or to which they are destined;<sup>30</sup> (2) persons in charge of vessels which enter any American port in violation of state or local quarantine laws or regulations are made liable to a prison sentence of thirty days or a fine of \$300, or both, the prosecution to be carried out by the United States District Attorney upon report by state or federal health officers;<sup>31</sup> (3) a forfeiture not to exceed \$5,000 may be enforced against any vessel entering, or attempting to enter, any United States port in violation of the rules and regulations established by state or municipal health authorities;<sup>32</sup> (4) the Surgeon General of the Public Health Service, under the direction of the Secretary of the Treasury, is authorized and directed to cooperate with and aid state and municipal boards of health in the execu-

<sup>29</sup> The more important quarantine acts which were passed by Congress in this period were Act of April 29, 1878, 20 *Stat.* 37, Act of March 3, 1879, 20 *Stat.* 484; Act of June 2, 1879, 21 *Stat.* 5; Act of Aug. 1, 1888, 25 *Stat.* 355; and Act of Feb. 15, 1893, 27 *Stat.* 449. A survey of the development of federal policy in this regard is given in Tobey, *op. cit.*, Chaps. III-IV.

<sup>30</sup> Act of April 29, 1878, c. 66, sec. 1, 20 *Stat.* 37; 42 *United States Code* (1934), sec. 86.

<sup>31</sup> Act of Aug. 1, 1888, c. 727, sec. 1, 25 *Stat.* 355; 42 *United States Code* (1934), sec. 106.

<sup>32</sup> Act of Feb. 15, 1893, c. 114, sec. 1, 27 *Stat.* 449; 42 *United States Code* (1934), sec. 81.



tion and enforcement of the rules and regulations of such boards;<sup>33</sup> (5) local health officers, upon proper authorization and application, may be invested with power to act as United States health officers in the enforcement of federal, state, and local quarantine regulations.<sup>34</sup> There remains also the provision of the 1799 law, already discussed, which requires federal revenue officers to comply with and aid in the enforcement of state and local quarantine and health laws.

While some of these provisions may be explained as mere authorizations of administrative coöperation in one way or another, it is difficult to see how the provisions mentioned under the first three points can be characterized as anything but adoptions of state and local quarantine laws and regulations. They recognize the right of the states and local governments to pass laws defining offenses to which a federal penalty will apply, and require federal administrative authorities to proceed with their enforcement through federal court action. These provisions accomplish an adoption of pertinent state and local laws and regulations *in futuro*. But, as has been pointed out above, if this is true these adoptive provisions must be considered violative of the principle that Congress may not delegate its legislative powers to state and local legislative bodies. They concede authority to the states to make and alter laws having the force of federal statutes, binding not only upon federal officers in the performance of their duties but operative also upon foreign commerce entering our ports.

These considerations gave pause to some members of the Senate when it was first proposed in Congress to provide a federal penalty for violation of a state or local quarantine regulation. The question was raised in 1879 when the first act passed by Congress authorizing the establishment of national quarantines was under consideration. The bill from which this act evolved originated in the Senate. As it came from committee it carried a clause imposing a forfeiture penalty upon vessels entering United States ports in violation only of federal laws and regulations.<sup>35</sup> Objection having

<sup>33</sup> Act of Feb 15, 1893, c. 114, sec. 3, 27 Stat. 450; 42 *United States Code* (1934), sec. 92. Sections 181, 182, 183, and 515 of the *Regulations for the Government of the United States Public Health Service* (1931) carry out the spirit of this provision.

<sup>34</sup> Act of April 29, 1878, c. 66, sec. 5, 20 Stat. 38; 42 *United States Code* (1934), sec. 92a.

<sup>35</sup> *Cong. Rec.*, 46th Cong., 1st Sess., p. 987.

been made that the proposed measure went too far in conferring power upon national administrative authorities to formulate regulations overriding those of the states, the bill was recommitted.<sup>36</sup> When it emerged again from committee its first section had been amended to make the forfeiture penalty applicable to vessels which might violate "rules and regulations of State Boards of Health or sanitary associations" recognized or made in pursuance of the proposed act.<sup>37</sup>

The constitutionality of this clause was immediately questioned by Senator Hoar, of Massachusetts. He insisted that, inasmuch as state regulations to be made in the future as well as those then in existence were envisioned, this provision proposed to delegate federal legislative power to the states. It would authorize them to make laws and regulations which the United States would undertake to enforce. This, he maintained, Congress might not do.<sup>38</sup> Other members of the Senate supported him in this view.<sup>39</sup>

In meeting this contention, advocates of the clause advanced the adoption theory. They argued that with respect to matters over which Congress and the states had concurrent authority, as in the matter at hand, Congress might adopt state laws and regulations and provide a penalty for their infraction. There was no delegation of power involved, since these state laws and regulations would acquire the character of federal laws or regulations by adoption. They maintained that the proposal merely carried forward the adoptive principle already recognized in the 1799 statute.<sup>40</sup>

No attempt to justify on any other ground the constitutionality of this clause was made. It may therefore be assumed that the adoption theory satisfied the constitutional scruples of most of the senators on the point. The question of constitutionality was raised

<sup>36</sup> *Ibid.*, p. 1048.

<sup>37</sup> *Ibid.*, p. 1507.

<sup>38</sup> *Ibid.*, pp. 1508, 1547.

<sup>39</sup> See the remarks of Senator Conkling, of New York, *ibid.*, p. 1519, Senator Whyte, of Maryland, *ibid.*, p. 1543; and Senator Edmunds, of Vermont, *ibid.*, p. 1547. Senator Edmunds called attention to the recent controversy over the Election Acts of 1870 and 1871, which had raised the same point. He based his objection primarily on the proposition that Congress could not provide punishment for an offense which it had not itself defined. *Ibid.*, pp. 1546-1547, 1549.

<sup>40</sup> See the remarks of Senator Harris, of Tennessee, *ibid.*, pp. 1511, 1520; Senator Call, of Florida, *ibid.*, pp. 1546, 1551; and Senator Lamar, of Mississippi, *ibid.*, pp. 1547-1548.

in the House discussion of this feature of the bill, but it was not pressed, and no extended discussion was had. Reference was made merely to the Senate debate on the matter, which had seemingly settled the point.<sup>41</sup> Although the same constitutional issue was presented in later acts in 1888 and 1893 there was no further discussion of it in Congress.

The courts have had no opportunity to consider the question, as no cases involving these adoptive clauses have arisen. A clew concerning the probable attitude of the Supreme Court on the matter is supplied by its opinions in the *State Election Law Cases* in 1879. Commenting on the authority of Congress to impose additional sanctions for violations of state election laws in Congressional elections, the Court, speaking through Justice Bradley, said:

The objection that the laws and regulations, the violation of which is made punishable by the acts of Congress, are State laws and have not been adopted by Congress, is not sufficient answer to the power of Congress to impose punishment. It is true that Congress has not deemed it necessary to interfere with the duties of the ordinary officers of election, but has been content to leave them as prescribed by State laws. It has only created additional sanctions for their performance . . . . The imposition of punishment implies a prohibition of the act punished. The State laws which Congress sees no occasion to alter, but which it allows to stand are *in effect adopted by Congress*. It simply demands their fulfillment.<sup>42</sup>

The Court in this instance refused to concede that Congress, by imposing sanctions for the violation of state laws, actually adopts them as its own. There results only an adoption "in effect." The reason for this wariness on the part of the Court in embracing the adoption theory may be seen in the argument advanced in the dissenting opinion in this and the companion case. In the dissenting opinion Justice Field, with whom Justice Clifford concurred, exposed the flaw in the adoption theory as applied to the facts of the cases at hand. Stated simply, Justice Field's argument was that an imposition of a federal penalty for violation of a state law must necessarily be predicated upon an adoption of the state law as federal law, since Congress cannot impose sanctions except for violations of its own laws. For Congress to impose sanctions for violations of state laws which were to be made in the future would constitute a delegation of its power of legislation to the states.

<sup>41</sup> *Ibid.*, p. 1645.

<sup>42</sup> *Ex parte Siebold*, 100 U. S. 371, 388-389 (1879). Italics mine.

Adoption, at the most, could be made to cover only those laws which were in existence at the time of the passage of the federal statutes.<sup>43</sup>

It would appear that the adoption theory provides the most plausible basis upon which these acts providing for a federally enforced state system of quarantine and health regulations can be sustained. Congress has no general power to legislate for the purpose of giving sanction to state laws.<sup>44</sup> The offenses for which it provides a federal punishment must be offenses against the United States. Hence, if it provides a punishment for violation of the laws of the states, it is logical to assume that the laws defining the offenses in question have been adopted as federal laws. But if these laws are adopted prospectively, the embarrassing question of delegation of power presents itself. If these provisions of the federal quarantine laws looking toward enforcement of local health and quarantine regulations are valid, either one or the other of two rather startling propositions is true: (1) in dealing with matters over which the states and Congress enjoy concurrent power under the commerce clause, Congress may authorize the states to establish regulations which will be enforced as federal regulations; or (2) the states possess power within this field in their own right to create offenses punishable by both federal and state authorities. It is hard to reconcile either proposition with established principles governing state-federal relations. But, as on other occasions when required to find a formula for adjusting state and federal authority over matters falling within the range of both the federal commerce power and the state police power, the Supreme Court might discover a constitutional basis for sustaining such coöperative acts without conceding either of these points. In the *State Election Law Cases* the Court regarded such laws as adoptions only "in effect," whatever that may mean. The question in this particular instance is likely to remain a more or less academic one, for federal regulation has so far occupied the field that the place accorded state and local health regulations is relatively unimportant where foreign commerce in our ports is directly involved.

It is doubtful whether these provisions of federal quarantine and health laws have been of great significance in inducing the courts to define more broadly the powers of the states to impose

<sup>43</sup> *Ex parte Clark*, 100 U. S. 399, 421 (1879).

<sup>44</sup> *United States v. Constantine*, 296 U. S. 287 (1935).

their health regulations upon commerce. The 1799 act has been cited on occasion in support of conclusions upholding state authority in this regard,<sup>45</sup> as have been the later acts.<sup>46</sup> But in these instances there was little question of the authority of the states to impose their health regulations upon commerce, except as there was an alleged interference with federal laws or treaties. The federal laws were cited to support the finding that Congress had not meant to overthrow state quarantine regulations by its acts. The authority of the state to enact quarantine regulations under its police power has been accepted generally. The chief significance of the federal quarantine laws lies in the fact that they contemplate a co-operative system of lawmaking. They assume the existence of authority in Congress to give effect to the laws and ordinances of the states in essentially the same way as it gives effect to its own legislative acts or to federal administrative regulations.

## 2. THE SLAVE TRADE

Two acts passed by Congress in reference to the slave trade bore provisions which might be characterized as adoptions of state law. One of these was the conditional-prohibition act of 1803, the genesis of which has already been described.<sup>47</sup> The first section of this act<sup>48</sup> prohibited the introduction of slaves from abroad into states which banned their importation. The third section declared it to be the duty of federal revenue officers "to notice and be governed by the provisions of the laws now existing in the several states, prohibiting the admission or importation of any negro, mulatto or other person of color." Furthermore, it enjoined them "vigilantly to carry into effect the said laws of said states, conformably to the provisions of this act; any law of the United States to the contrary notwithstanding." There was no penalty provided for violation of this part of the statute, but there was such a provision attached to the conditional prohibition in the first section.

The clause regarding administrative coöperation bore a close resemblance to the 1799 quarantine statute, except for one particular. The 1799 statute had reference to state and local measures which might be adopted in the future as well as to those already in ex-

<sup>45</sup> See cases cited *supra*, p. 349, under notes 20, 21, and 24.

<sup>46</sup> *Compagnie Française de Navigation, etc. v. Louisiana State Board of Health*, 186 U. S. 380, 396 (1902).

<sup>47</sup> *Supra*, p. 270.

<sup>48</sup> Act of Feb. 28, 1803, 2 *Stat.* 205.

istence. It was prospective in operation. The 1803 slave-trade law was definitely limited to *existing* laws of the states. It sanctioned no change in scope by reason of future modifications of state laws to which reference was made. Whether this particular phrasing of the statute was indicative of a Congressional understanding that power was lacking to make the regulation apply to state laws yet to be enacted cannot be gleaned from the meager records available. It is possible that Congress, conceiving the measure to be adoptive of state laws, deliberately limited its application to those state laws then in existence. Whatever the reasons may have been, the language employed gave sanction only to the system of state laws then in force. If Congress intended to adopt those laws, it adopted them knowing their content. No cases arose under this provision of the act to permit an expression of judicial opinion upon its validity. In view of the favorable attitude assumed by the courts on the 1799 quarantine measure, which was more questionable by reason of its prospective force, its validity seems beyond doubt.

In anticipation of the lapse of the temporary constitutional restriction upon its power to prohibit the importation of slaves Congress passed in 1807 an act prohibiting the introduction of slaves into the United States. There was general agreement in Congress at that time that this trade should be abolished; but in formulating the prohibitive statute a difference of opinion developed with regard to the disposition to be made of illegally imported Negroes. The issue was, fundamentally, whether such Negroes should be given their freedom, or be disposed of as were other articles of commerce introduced into the country in violation of the revenue laws, that is, forfeited and sold at auction. Numerous compromise suggestions were offered, and the bill was recommitted twice in an effort to resolve the issue.<sup>49</sup> A solution was ultimately found in a provision which left this matter to be dealt with by the states as they saw fit.<sup>50</sup>

<sup>49</sup> During the consideration of the bill in Congress twelve different solutions were suggested. An account of the matter may be found in William E. Bughardt Du Bois, *The Suppression of the African Slave-Trade to the United States of America 1638-1870* (1904), pp. 96-102.

<sup>50</sup> Act of March 2, 1807, c. 22, sec. 4, 2 Stat. 427: "...Neither the importer, nor any person or persons claiming from or under him, shall hold any right or title whatsoever to any negro, mulatto, or person of color, nor to the service or labor thereof, who may be imported or brought within the United States . . . in violation of this law, but the same shall remain subject to any regulation not

The reports of the Congressional debates do not indicate that any member of Congress attempted to explain this part of the act as an adoption of state laws. Such a characterization of it might properly have been made. The authority of Congress to provide for the disposition of illegally imported slaves was generally conceded to be incidental to its power to prohibit their introduction. Congressional authority to subject this phase of the matter to state control was defended on that ground in the debates. Indeed, Congress assumed by the statute the right to regulate the matter, in part, by declaring a forfeiture of property interest in such slaves so far as the importer and his assigns were concerned. What it did in effect was to set up a regulation of the slave trade and adopt state laws as a part of its regulation on one important point. The outlines of the federal regulation could be made complete only by reference to the supplementary laws of the states.

The validity of this provision was not tested in the courts, although it was construed and applied by the Supreme Court.<sup>51</sup> It remained operative for only about a decade. The general ineffectiveness of earlier anti-slave-trade laws led Congress to pass an act in 1819 providing additional enforcement facilities.<sup>52</sup> This later act was held to have repealed the provisions of the 1807 act respecting the disposal of illegally imported Negroes, although there was no express declaration to that effect.<sup>53</sup> Laxity in enforcement prevented the question of the disposal provision of the 1807 statute from coming before the courts for examination. Whether they would have ascribed to it the character of an adoptive statute, or would have regarded it as merely a limitation upon the scope of the federal act of which it was a part, remained problematical.

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contravening the provisions of this act, which the legislatures of the several states or territories at any time hereafter may make, for disposing of such negro, mulatto, or person of color."

<sup>51</sup> *The Josepha Segunda*, 5 Wheat. 338 (U. S.) (1820) and 10 Wheat. 312 (U. S.) (1825); *United States v. Preston*, 3 Pet. 57 (U. S.) (1830)

<sup>52</sup> Act of March 3, 1819, 3 Stat. 532. This new act specified that any slaves found to have been illegally imported were to be taken into the custody of the United States marshal for the district, subject to the orders of the President.

<sup>53</sup> *United States v. Preston*, 3 Pet. 57, 66 (U. S.) (1830); *State v. Caroline*, 20 Ala. 19 (1852). See also 4 *Ops. Atty. Gen.* 567 (1847) and 9 *Ops. Atty. Gen.* 302 (1859). In *United States v. Hann*, 26 F. Cas. 227 (No. 15,329) (Cir. Ct., Ala.) (1860), it was held that a federal indictment might lie under the 1818 anti-slave-trade statute (3 Stat. 450) for the offense of holding, selling, or disposing of an illegally imported Negro. *Contra*, *United States v. Gould*, 25 F. Cas. 1375 (No. 15,239) (D. C., Ala.) (1860).

## 3. PILOTAGE

WHEN Congress came into possession of the power to regulate commerce, it found in operation in most of the states legislation regulating port pilotage. These laws, dating from early colonial times in some instances, were designed primarily to furnish protection to commerce. By them pilots were required to have evidence of their competency in the shape of licenses issued by local or state authorities; an obligation was imposed upon pilots to serve when called upon; and fees for their services were fixed. Apparently doubtful of the validity of these laws after 1789, in the absence of a federal sanction, Congress acted at once to deal with the situation. Detailed legislation meeting the varying requirements of the different ports and districts of the country was needed, but Congress was in no position at that time to dispose of the matter in so thorough a fashion. Accordingly the expedient was adopted of continuing in force the existing state laws on the subject.

This was done by including in the Act of August 7, 1789, which provided for assumption of federal responsibility for the maintenance of certain aids to navigation along the coasts, the following section:

All pilots in the bays, inlets, rivers, harbors and ports of the United States, shall continue to be regulated in conformity with the existing laws of the states respectively wherein such pilots may be, or with such laws as the states may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress.<sup>54</sup>

Although Congress has in part supplanted state pilotage legislation by laws setting up a national system of pilot licenses for steam vessels,<sup>55</sup> the 1789 statute has continued in force to the present time.<sup>56</sup>

The construction of this act has given the courts much difficulty. On its face it appears to be an outright delegation of power over this subject to the states. It declares the laws of the states to be the laws by which the subject is to be governed. But to base state authority to regulate pilotage upon the federal statute would be inconsistent with the concept of dual federalism which impliedly forbids the surrender of a national legislative power to the states

<sup>54</sup> Act of August 7, 1789, c. 10, sec. 4, 1 *Stat.* 54.

<sup>55</sup> See 46 *United States Code* (1934), secs. 213-215, 364.

<sup>56</sup> *Ibid.*, sec. 211.



by legislative decree. Since the control of pilotage is clearly "regulation" of commerce in fact, and has been so recognized by the Supreme Court,<sup>57</sup> there was much turning about by the courts in an attempt to harmonize this legislation with the doctrines of the exclusiveness of the commerce power and the nondelegability of federal legislative authority. The adoption theory has played a part in this process.

The act presented no difficulties to the advocates of the concurrent-powers theory. In accordance with this view of the relationship between federal and state authority under the commerce clause the pilotage law of 1789 was assumed to be an expression of an intention by Congress to leave this phase of commercial activity to be regulated by state laws temporarily, the states deriving no power from the grant. The act was merely an invitation to the states to exercise their own concurrent authority.<sup>58</sup>

A number of theories were advanced to harmonize this legislation with the exclusive-power doctrine and to escape the conclusion that a delegation of power had been effected by Congress. When judicial attention was first directed to it, the position was taken that, by this act, Congress adopted state regulations upon the subject and made them operative upon foreign and interstate commerce. Such was the view expressed by Chief Justice Marshall in a *dictum* in *Gibbons v. Ogden*.<sup>59</sup> Other members of the Court expressed similar views in subsequent cases.<sup>60</sup>

<sup>57</sup> *Cooley v. Board of Wardens*, 12 How. 299, 315 (U. S.) (1851); *Ex parte McNeil*, 13 Wall. 236, 238 (U. S.) (1871); *Anderson v. Pacific Coast S. S. Co.*, 225 U. S. 187, 195 (1912).

<sup>58</sup> See the comments of Chief Justice Taney in *The License Cases*, 5 How. 504, 580 (U. S.) (1874); of Justice Catron at p. 607 in the same case; and of Justice Daniel in *The Passenger Cases*, 7 How. 283, 497 (U. S.) (1849). The latter even went so far as to assert that only the states were competent to deal with pilotage matters, since the subject was one requiring diversity of treatment, and Congress might legislate only by laws having uniform operation. See his concurring opinion in *Cooley v. Board of Wardens*, 12 How. 299, 326 (U. S.) (1851).

<sup>59</sup> 9 Wheat. 1, 207 (U. S.) (1824): "Although Congress cannot enable a State to legislate, Congress may adopt the provisions of a State on any subject When the government of the Union was brought into existence, it found a system for the regulation of its pilots in full force in every State. The act which has been mentioned, adopts this system, and gives it the same validity as if its provisions had been specially made by Congress."

<sup>60</sup> *Hobart v. Diogan*, 10 Pet. 108, 120 (U. S.) (1836), *per* Story, J.; *The Passenger Cases*, 7 How. 283, 402 (U. S.) (1849), *per* McLean, J.; *Cooley v. Board of Wardens*, 12 How. 299, 321 (U. S.) (1851), dissenting opinion of McLean, J. See also *The Wave*, 29 F. Cas. 453 (No. 17,297) (D. C., S. D. N. Y.) (1831); *The Wave*

The chief difficulty with this position was that it did not provide a satisfactory basis for holding valid state pilotage acts passed *after* the enactment of the federal law in 1789. The power of Congress to adopt existing state pilotage systems as a federal system could not be seriously questioned. But the federal act specified that pilots were to be regulated in conformity not only with "existing" laws of the states, but with those which the states might thereafter enact.<sup>61</sup> To hold that the act had a prospective force would be to admit power existed in the states to annul or modify a federal statute by making changes in its pilotage laws. This would constitute a delegation of federal legislative power to the states. The adoption theory therefore carried with it the implication that changes made by states in their pilotage laws after 1789 must be held to have no effect in modifying pilotage regulations governing interstate and foreign commerce.

This implication was recognized in some of the judicial statements upholding the adoption theory. It was conceded that, while a state might repeal or amend its pilotage laws, such changes could have no effect with reference to foreign or interstate commerce until Congress had specifically adopted these modifications. On this ground Justices McLean and Wayne refused to follow the majority of the Court in holding a pilotage act of Pennsylvania applicable to interstate commerce. Justice McLean pointed out that, since the state act involved was passed fourteen years after the 1789 act, it was impossible to consider the state law to have been adopted by Congress without admitting that a state could supersede an act of Congress by legislation of its own.<sup>62</sup> This implication in the adoption theory was likewise pointed out by those who proposed to place the basis of such state legislation in a general concurrent authority of the states to regulate commerce.<sup>63</sup>

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v. *Hyer*, 29 F. Cas. 464 (No. 17,300) (Cir. Ct., N. Y.) (1831); *Low v. Commissioners of Pilotage*, R. M. Charl. 302, 314 (Ga.) (1830).

<sup>61</sup> In the *Revised Statutes* and in the present *Code* the word "hereafter" of the original act has been omitted; but the clause apparently still has reference to future state laws.

<sup>62</sup> *Cooley v. Board of Wardens*, 12 How. 299, 324 (1851).

<sup>63</sup> Chief Justice Taney in *The License Cases*, 5 How. 504, 580 (U. S.) (1847), adverted to the awkwardness of the situation that would result if state pilotage laws were held applicable to interstate and foreign commerce only by virtue of having been adopted as national laws. Since the system of state laws had been greatly changed since 1789, most of the pilotage acts in effect in 1847 would

When finally confronted directly with the question of the construction of the 1789 act, a majority of the Supreme Court eschewed the adoption theory. The basis of the authority of the states to legislate upon the subject of pilotage was declared to lie in the power reserved to the states to enact regulations of commerce in regard to matters wherein diversity of regulation was desirable and appropriate. Pilotage acts were commercial regulations dealing with a phase of commercial activity which by its nature could be properly left to local control.<sup>64</sup> Acceptance of the "local-concurrent-powers" doctrine by the Court made it unnecessary to ascribe an adoptive effect to the federal law. The federal statute became nothing more than a disclosure of a Congressional opinion that the subject was one which could most advantageously be controlled by state laws. The authority upon which the states acted was original, and in no sense derived from the statute, although the subject was conceded to be one to which the federal regulatory power might be extended.

This construction of the federal act and the commerce clause enabled the Court to meet the delegation-of-power contention, which it admitted was sound unless authority of the states to act on this subject through their reserved powers was recognized.<sup>65</sup> At the same time, however, it appears to have been the view of the Court that state acts in existence at the time of the passage of the federal statute might well be considered to have been adopted as federal regulations by the 1789 law.<sup>66</sup> The Court in reaching its conclusion seems also to have placed some weight upon the Congressional declaration that the subject of pilotage was one that

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have to be regarded as "mere nullities" so far as interstate and foreign commerce was concerned.

<sup>64</sup> *Cooley v. Board of Wardens*, 12 How. 299, 318 (U. S.) (1851).

<sup>65</sup> *Ibid.*, p. 318.

<sup>66</sup> *Ibid.* "If the law of Pennsylvania, now in question, had been in existence at the date of this act of Congress, we might hold it to have been adopted by Congress, and thus made a law of the United States, and so valid. Because this act does, in effect, give the force of an act of Congress, to the then existing state laws on this subject, so long as they should continue unrepealed by the state which enacted them."

It should be observed that the learned Justice here, although endorsing the adoption theory as a basis for sustaining state laws in existence at the time of passage of the federal act, concedes in the same sentence that a state might *repeal* such adopted laws. This concession actually denies the adoption construction; for a state would have no more authority to repeal an adopted act *as federal law* than it would to enact a new law having the force of a federal statute by virtue of a federal adoption *in futuro*.

could properly be held to fall within the scope of state regulatory power.<sup>67</sup>

Although the construction of the 1789 act as an adoption of state laws was rejected by the Court in this case, the view of the law as an adoptive statute has not been completely abandoned. When occasion has demanded, the adoption theory has been resurrected as a basis for sustaining state acts. This has been true particularly in cases in which courts have been called upon to consider the effect of state pilotage acts beyond the limits of state jurisdiction. Thus when a contention was made that the state of New York lacked authority to apply its pilotage laws to cover a tender of service by a pilot at a point some fifty miles from the port of destination in that state, one of the answers made by the Supreme Court was that the Congressional act amounted to an "implied ratification and adoption" of state laws on this subject.<sup>68</sup> A district court in 1881 stated that the 1789 statute "adopted the existing laws of the states, regulating the subject of pilotage, and provided for the adoption of such others as they might thereafter make,—thus conferring upon the acts of the state legislatures the effect of federal statutes."<sup>69</sup> In reviewing this decision an appellate court found the district court's opinion "so satisfactory" that there was no need to amplify it.<sup>70</sup> Justice Holmes, arguing that Congress possessed authority to adopt state workmen's-compensation laws to cover cases of injuries suffered by longshoremen, cited the 1789 pilotage act as an example of a federal statute adopting state laws.<sup>71</sup>

The matter has been complicated further by an act passed by Congress in 1837 authorizing masters of vessels entering or leaving any port situated upon waters which are the boundary between two states to employ any pilot licensed under the laws of either state.<sup>72</sup> This law has been interpreted so as to bring about, in a

<sup>67</sup> *Ibid.*, p. 319.

<sup>68</sup> *Wilson v. McNamee*, 102 U. S. 572, 575 (1880), *per* Swayne, J. The Court cited with approval the statements of Justice Joseph Story, *Commentaries on the Constitution of the United States* (1833), Vol II, sec. 1066, and of Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. 1, 207 (U. S.) (1824), to the effect that Congress by this statute had adopted state pilotage acts.

<sup>69</sup> *The Clymene*, 9 F. 164 (D. C., Penn.) (1881).

<sup>70</sup> *Ibid.*, 9 F. 346 (Cir. Ct., Penn.) (1882).

<sup>71</sup> *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 169 (1920).

<sup>72</sup> 5 Stat. 153; 46 *United States Code* (1934), sec. 212. The act was passed in an effort to break the monopoly of New York pilots on business at the port of New York by making New Jersey pilots eligible for service at that port. The law having achieved its object, efforts to bring about its repeal were made in 1846,

sense, the extension of the pilotage laws of one state into the jurisdiction of another. Thus a federal district court held that a New Jersey pilot could compel payment of pilotage fees in accordance with a New York pilotage act, even though the New York law, by its express terms, applied only to pilots holding licenses issued by that state. The 1837 act, in conjunction with the 1789 statute, not only made valid the license of the New Jersey pilot in New York, but also compelled observance of the fee requirements of the New York law in respect to him.<sup>73</sup> This result was obviously predicated upon an adoptive construction of the 1837 act. New Jersey acting under its concurrent authority to regulate local commerce could not make its licenses valid in an adjoining state in direct opposition to that state's laws. As the Court admitted, this could result only by virtue of the act of Congress, which gave licenses issued under New Jersey's laws a legal status in other jurisdictions. The 1789 act, together with the 1837 statute, achieved an adoption of one state's licensing laws and regulations in the sense that licenses issued under them were given the status of federal licenses in another jurisdiction.

Some clashing of interests has resulted from leaving the subject in state hands, particularly since the 1837 law has made it possible for one state to take advantage of its situation and legislate to the advantage of its own pilots.<sup>74</sup> A general abuse of power such as was forecast in certain dissenting judicial opinions in cases involving state pilotage acts<sup>75</sup> has not materialized, however. Congress has found it necessary to intervene by law to prohibit discrimination in state pilotage regulations between vessels sailing between ports of one state and those of another, between steam vessels and other vessels, and between vessels of the national government and others.<sup>76</sup> In 1852 a system of federal licenses for pilots on steam

1847, and 1848, but without success. See H. G. Ward, "Pilotage—State Legislation Thereon," 17 *American Law Rev.* 372, 379 (May-June, 1883).

<sup>73</sup> *Reardon v. Arkell*, 59 F. 624 (D. C., S. D. N. Y.) (1894). This ruling was not in harmony with New York court holdings on the same point. See *Hopkins v. Wyckoff*, 1 Daly 176 (Comm. Pl., N. Y.) (1861), and *Brown v. Elwell*, 60 N. Y. 249 (1875). In *Dryden v. Commonwealth*, 55 Ky. 598 (1855), and *Cribb v. Florida*, 9 Fla. 409 (1861), the validity of licenses granted in other jurisdictions was upheld in the face of contrary provisions in the laws of the states concerned.

<sup>74</sup> Ward, *op. cit.*

<sup>75</sup> *Cooley v. Board of Wardens*, 12 How. 299, 324 (U. S.) (1851); *Steamship Co. v. Joliffe*, 2 Wall. 451, 469 (U. S.) (1864).

<sup>76</sup> Act of July 13, 1866, 14 *Stat.* 93, 46 *United States Code* (1934), sec 213. For

vessels was provided by national act, and such licenses in certain instances have been made valid for port pilotage purposes<sup>77</sup> But the original act of 1789 still stands, and pilotage is still partly regulated by state law.

Though the subject is of minor importance, judicial pronouncements in cases arising in relation to it have been of considerable significance. The construction of the 1789 statute provided the occasion for the statement of the local-concurrent-powers theory of the commerce clause. When construed in connection with the 1837 act, the 1789 law in some instances has forced the courts into the position of practically conceding to Congress power to adopt prospectively state legislation and regulations thereunder. Though an outright delegation of power to the states by a prospective adoption of their acts is declared by the Supreme Court to be impossible, judicial rulings in some instances in pilotage cases have seemed to sanction action of this character. Whatever construction is given the 1789 act, it must be conceded to have had an important part in bringing about a more liberal definition of the scope of state authority over local phases of commercial activity.

#### 4. WORKMEN'S COMPENSATION IN MARITIME EMPLOYMENTS

AN ACT of Congress recognizing state authority to legislate upon the qualifications, compensation, and conditions of service of port pilots was, as has already been shown, sustained by the Supreme Court. The Court agreed with Congress in the view that the subject is one permitting a diversity of treatment in accordance with state laws, even though pilots are engaged in a maritime employment and interstate and foreign commerce is directly affected by state pilotage laws. A different result followed, however, when Congress attempted to extend to another class of maritime workers the benefits of state workmen's-compensation legislation. The acts of Congress in this instance were passed under its authority to

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cases in which this act has been construed see *Thompson v. Darden*, 198 U. S. 310 (1904), and *Sprague v. Thompson*, 188 U. S. 90 (1890).

<sup>77</sup> The courts have had considerable difficulty in determining the effect of this law in overriding state pilotage regulations. See *Steamship Co. v. Joliffe*, 2 Wall. 451 (U. S.) (1864); *Huus v. New York and Porto Rico S. S. Co.*, 182 U. S. 392 (1900); and *Anderson v. Pacific Coast S. S. Co.*, 225 U. S. 187 (1912). The opinion in this last case contains a review of federal legislation on the subject of pilotage.

modify the rules of maritime law applied in the admiralty courts of the United States, rather than under the commerce power. Nevertheless, the parallel between them and other adoptive acts under the commerce clause was very close. A brief consideration of the grounds upon which Congressional acts seeking to adopt state workmen's-compensation laws were overthrown will throw additional light upon the general question of this study.

The need for action by Congress in reference to workmen's compensation in maritime employments arose from a five-to-four decision of the Supreme Court in 1917 holding that the workmen's-compensation act of New York could not be applied to cover the case of a stevedore fatally injured while assisting in unloading a vessel at the wharf in New York harbor.<sup>78</sup> A rule incorporated in the original Judiciary Act of 1789 and carried forward in the Judicial Code provided that federal district courts should have original and exclusive jurisdiction in civil causes arising within the admiralty jurisdiction, saving to suitors, in all cases, "the right of a common law remedy where the common law is competent to give it."<sup>79</sup> Under this saving clause state courts of law enjoyed a concurrent jurisdiction with federal district courts in certain civil causes in admiralty. By a gradual process of evolution rules and principles of the common law, as modified by state statutes, had been introduced into the maritime law applied in admiralty courts.<sup>80</sup>

In *Southern Pacific Company v. Jensen* it was argued that the state compensation act was applicable as a statutory modification of the common law of the state. The New York Court of Appeals had so ruled in upholding the award of the State Industrial Compensation Commission.<sup>81</sup> The United States Supreme Court re-

<sup>78</sup> *Southern Pacific Co. v. Jensen*, 244 U. S. 205 (1917). A companion case, *Clyde S. S. Co. v. Walker*, 244 U. S. 255 (1917), turned upon the decision in this case.

<sup>79</sup> Act of March 3, 1911, 36 Stat. 1087, secs. 24, cl. 3, and 256, cl. 3.

<sup>80</sup> A discussion of this development is given in the dissenting opinions of Holmes and Pitney, JJ., in the *Jensen* case. See also Edgar T. Fell, *Recent Problems in Admiralty Jurisdiction*, Johns Hopkins University Studies in Historical and Political Science, Ser. XL, No. 3 (1922), Chap. I; John G. Palfrey, "The Common Law Courts and the Law of the Sea," 36 *Harvard Law Rev.* 777 (May, 1923); E. Merrick Dodd, Jr., "The New Doctrine of the Supremacy of Admiralty over the Common Law," 21 *Columbia Law Rev.* 647 (Nov., 1921).

<sup>81</sup> *Jensen v. Southern Pacific Co.*, 215 N. Y. 514, 109 N. E. 600 (1915); *Walker v. Clyde S. S. Co.*, 215 N. Y. 529, 531, 109 N. E. 604, 605 (1915).

fused to regard the state workmen's-compensation act as falling within the scope of this saving provision. It held that a state was not authorized by the provision to change or affect the rules of maritime law covering liability of an employer for accidental injury to his employee in the absence of negligence.<sup>82</sup> Since the Federal Employers' Liability Act was not applicable, the result was to leave cases of accidental injury to maritime workers outside the scope of both federal and state compensation legislation.

Congress acted at once to meet the situation. An amendatory act to the Judiciary Code was passed in which the purpose to extend to maritime workers the rights and remedies of state workmen's-compensation legislation was clearly stated.<sup>83</sup> The amendment modified the clauses defining the jurisdiction of district courts in civil admiralty causes by adding to the proviso saving common-law remedies to suitors the phrase "and to claimants the rights and remedies under the workmen's compensation law of any State." After several state and federal court decisions had been given in which the amended provision was applied without a definite conclusion upon its validity,<sup>84</sup> the question of its constitutionality was brought before the Supreme Court. A New York harbor bargeman, while engaged in work of a maritime nature, fell into the Hudson River and was drowned. His widow, claiming under the workmen's-compensation act of the state, secured an award against the employing company and the claim was upheld by the state Court of Appeals.<sup>85</sup>

The Supreme Court, again by a five-to-four margin, with the same members in the minority as in the *Jensen* case, reversed the

<sup>82</sup> *Southern Pacific Co. v. Jensen*, 244 U. S. 205 (1917), Holmes, Pitney, Clarke and Brandeis, JJ., dissenting.

<sup>83</sup> Act of Oct 6, 1917, 40 Stat. 395. The proposal was introduced by Senator Johnson, of California, and encountered no opposition in either house. See *Cong. Rec.*, 65th Cong., 1st Sess., pp. 7605, 7843, and *S. Rept.* 139 for the same session.

<sup>84</sup> *The Steamlighter Howell*, 257 F. 578 (D. C., S. D. N. Y.) (1919); *Rhode v. Grant Smith Power Co.*, 259 F. 304 (D. C., Ore) (1919); *Ruddy v. Morse Dry Dock and Repair Co.*, 176 N. Y. S. 731, 107 Misc. 199 (1919); *Dziengelewsky v. Turner and Blanchard, Inc.*, 176 N. Y. S. 729, 107 Misc. 45 (1919); *Duart v. Simmons*, 231 Mass. 313, 121 N. E. 10 (1918). In *Peters v. Yeasey*, 251 U. S. 121 (1919), the amendment was construed not to be retroactive, but no comment was made upon its validity. For a discussion of these cases see Francis J. MacIntyre, "Admiralty and the Workmen's Compensation Law," 5 *Cornell Law Quart.* 275 (March, 1920).

<sup>85</sup> *Stewart v. Knickerbocker Ice Co.*, 226 N. Y. 302, 123 N. E. 382 (1919).



ruling of the state court.<sup>86</sup> The amendment purporting to save to claimants a remedy through compensation procedure was held unconstitutional. This result the Court reached by following a line of reasoning which began with the acceptance of the principle that the Constitution adopted and established the rules of general maritime law as a part of the laws of the United States. These rules were beyond the power of the state to contravene or modify. To permit them to be changed by state laws would disrupt the harmony and uniformity of the maritime law in its international and interstate relations. Although Congress might alter these rules by legislation, it might not delegate this authority to the states. Substantive rights under the maritime law could not be created by state law.

The views of the minority were set forth in a dissenting opinion by Justice Holmes. The minority maintained that state compensation laws were made applicable not only by virtue of the original clause saving common-law remedies where applicable, but also by reason of their outright and specific adoption through the force of the 1917 amendatory provision. Pilotage cases and other cases wherein adoptive acts of Congress were upheld were cited as evidence that it was within the competence of Congress to adopt state legislation on a subject falling within the range of federal power.<sup>87</sup> The minority held that this realistic view of Congressional power to conform its laws to those of the states was supported by the recent decision of the Court sustaining the validity of the Webb-Kenyon Act.<sup>88</sup>

The majority opinion seemed to indicate that the main objection to federal adoption of state compensation laws for maritime workers was the fact that members of ships' crews would be covered by different local laws as their vessels moved from port to port.

<sup>86</sup> *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149 (1920). The opinion was given by Justice McReynolds, who also gave the opinion of the Court in *Southern Pacific Co. v. Jensen*.

<sup>87</sup> *Ibid.*, p. 169. "I assume that Congress could not delegate to state legislatures the simple power to decide what the law of the United States should be in that district. But when institutions are established for ends within the power of the State and not for any purpose affecting the law of the United States, I take it to be an admitted power of Congress to provide that the law of the United States shall conform as nearly as may be to what for the time being exists."

<sup>88</sup> *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U. S. 311 (1917); see *supra*, p. 227.

They and their employers would be subjected to the inconvenience of a varied system of regulations defining their respective rights and obligations. Accordingly, a second adoptive statute which would not be open to this criticism was sought. This objective was soon achieved by the passage of an act in 1922 designed to extend to longshoremen, but not to members of the crews of vessels, the benefits of the compensation legislation of the states in which they were employed. The new act,<sup>89</sup> framed after much deliberation by the respective judiciary committees of the two houses of Congress, was not only more limited in its scope than the previous amendatory act, but it attempted also to clarify some of the jurisdictional and procedural questions upon which there had been a diversity of opinion in lower federal and state courts under the former statute. By exempting masters and crews from the operation of state compensation laws, and by making the rights and remedies under these laws exclusive where applicable, it was hoped that the objections raised in the majority opinion against the previous act would be met.

These hopes proved ill-founded. Rulings by California and Washington courts held the amendments to the Judicial Code to be ineffective in extending state compensation-law rights and remedies to harbor workers.<sup>90</sup> These decisions were affirmed by the United States Supreme Court, and the amendatory act was held unconstitutional.<sup>91</sup> The exception of master and crew from the application of state compensation laws was held insufficient to permit distinguishing the cases at hand from *Knickerbocker Ice Company v. Stewart*. The Court pointed out that the only way open to alter or supplement the maritime law in reference to workmen's-compensation rights and remedies was by statutes enacted by Congress, embodying its deliberate will and judgment. This national function could not be delegated to the several states.

Once more the problem was thrown back upon Congress. As the way was apparently closed by these decisions for an extension of state compensation laws to longshoremen by federal act, the

<sup>89</sup> Act of June 10, 1922, 42 Stat. 634. As in the case of the first amendatory act there was no opposition to the measure in either branch of Congress.

<sup>90</sup> *Washington v. Dawson and Co.*, 122 Wash. 572, 211 Pac. 724 (1922); *Rolph v. Industrial Accident Commission*, 192 Cal. 398, 220 Pac. 669 (1923).

<sup>91</sup> *Washington v. Dawson and Co.*, 264 U. S. 219 (1924); *Industrial Accident Commission v. Rolph*, *ibid.* Brandeis and Holmes, JJ., offered dissenting opinions.

only course open was the enactment of a federal compensation law for such workers. This was done by the passage of the Longshoremen's and Harbor Workers' Compensation Act of 1927.<sup>92</sup> Federal legislation of this nature had already been passed for the benefit of seamen.<sup>93</sup>

These cases denying power to Congress to make state workmen's-compensation laws applicable in maritime employments constitute a most important phase in the development of the principles governing the rules of maritime law applied in admiralty courts.<sup>94</sup> They stand in the same light as the great nationalizing cases under the commerce clause in their exclusion of the states from an important field of legislation. A check was placed upon the movement to assimilate into the system of maritime law the rules of the common law as developed in state courts and modified by state legislative enactments. A requirement of national uniformity analogous to that evolved in connection with the regulation of commerce was set up as a basis for denying authority to the states to legislate upon this subject. Express action by Congress was not allowed to override this requirement.

The connection between the rule of exclusiveness in respect to the commerce power and the power over maritime law was expressly recognized by the Court.<sup>95</sup> Yet, as has been seen, the requirement

<sup>92</sup> Act of March 4, 1927, 44 Stat. 1424. In amended form it is now found in 33 U. S. C. A. (1940 Supp.), secs. 901-950. The measure was subsequently upheld by the Supreme Court in *Crowell v. Benson*, 285 U. S. 22 (1932).

<sup>93</sup> Legislation giving a cause of action for death by wrongful act on the high seas was passed in 1920, 41 Stat. 537. In the same year the Federal Employers' Liability Act was extended to seamen employed on American vessels, c. 248, sec. 33, 41 Stat. 1007. See 46 *United States Code* (1934), secs. 688, 761-768.

<sup>94</sup> For an excellent discussion and criticism of these cases see Stanley Morrison, "Workmen's Compensation and the Maritime Law," 38 *Yale Law Jl.* 472 (Feb., 1929).

<sup>95</sup> In *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 216 (1917), the Court declared: "A similar rule of uniformity in respect to interstate commerce deduced from the grant to Congress of power to regulate it is now firmly established.... And the same character of reasoning which supports this rule, we think, makes imperative the stated limitation upon the power of the states to interpose where maritime matters are involved."

Strangely enough, in this statement Justice McReynolds cited for authority one of the leading cases, *Clark Distilling Co. v. Western Maryland Ry. Co.*, which support the proposition that Congress may be the judge as to whether the regulation of commerce in regard to a given commodity shall be nationally uniform or diversified in accordance with state policy. This was the very principle denied application in the case at hand.

of uniformity of treatment has been no bar to state regulation of commerce by Congressional consent. Although the power of Congress to legislate under the commerce clause and its power to legislate under the grant of admiralty jurisdiction to the federal courts are not the same in scope or nature,<sup>96</sup> it would seem that they are of sufficiently similar character that a requirement of uniformity of treatment derived by implication from the needs of commerce should have no more effect in the one case than in the other in barring state legislation. If Congress under its commerce power can "adopt" or "recognize" state laws dealing with a subject of commercial regulation held by the courts to be beyond their power by reason of the need for uniformity of treatment, it would seem to have the same authority to permit state laws to apply in reference to the rules of the maritime law. It is no more a delegation of power in the one case than in the other.

An inconsistency in attitude on the part of the Court is seen particularly in these compensation cases and cases involving state regulation of pilotage. Port pilots are engaged in a maritime occupation, and the courts have never doubted that cases arising in connection with their employment fall within the admiralty jurisdiction.<sup>97</sup> State laws concerning pilots have the effect of creating substantive rights and obligations recognizable in admiralty courts. There would seem to be no reason to distinguish the one class of maritime workers from the other in permitting diversity of treatment in accordance with state law. If anything, the differences militate more strongly against state regulation of pilots. Pilots are engaged in an activity wholly connected with the movement of the ship itself, while harbor workers have no connection with a vessel in movement.

<sup>96</sup> This point was made by Justice McReynolds, though in vague language, in *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 161: "The distinction between the indicated situation created by the Constitution relative to maritime affairs and the one resulting from the mere grant of power to regulate commerce without more, should not be forgotten."

The distinction apparently intended to be made by the Court was that it is the *judicial power* conferred on the federal courts by the admiralty clause, rather than the legislative power impliedly conferred on Congress under it, that stands as a bar to state legislation of the type disallowed in the compensation cases. *Dodd, op. cit.*, p. 656.

<sup>97</sup> *Ex parte McNeil*, 13 Wall. 236 (U. S.) (1871); *Ex parte Hager*, 14 Otto 520 (U. S.) (1881); *Hobart v. Drogan*, 10 Pet. 108 (U. S.) (1836); *The Anne*, 1 F. Cas. 955 (No. 412) (Cir. Ct., Mass.) (1818).

The attitude of the Court in the workmen's-compensation cases stands in strange contrast to that which it has shown in those involving permissive and adoptive acts by Congress under the commerce clause. In the workmen's-compensation cases the Court assumed the right to overrule Congress on the point of the necessity of uniformity in laws dealing with a matter relating to interstate and foreign commerce. The Court held that the need for uniformity in regulation was primarily a judicial, not a legislative question. It held that when control over a subject matter has been placed in the hands of Congress by the Constitution, the states cannot be given authority to legislate upon it through an adoption of their acts by Congress. These rulings exalt national commercial interests to the point of excluding the possibility of a devolution of power over them to the states. They are in accordance with the trend against states' rights which was manifested decades earlier in cases arising under the commerce clause.

In view of the developments which have occurred in federal-state relations in the field of commercial regulation—developments looking toward facilitation of federal-state cooperation both administratively and legislatively—the principles followed in the workmen's-compensation cases are not in harmony with the general trend. They represent the orthodox view on the matter of federal authority to confer power upon the states. As has been shown in the preceding chapters orthodox views on such matters as the non-delegability of the federal commerce power to the states and judicial supremacy in the determination of the limits of state power over commerce have been subjected to a severe strain. It must be concluded that Congress, acting through its power to regulate commerce, has a much wider choice of modes of procedure than it has under its implied authority to modify the rules of maritime law applied in the federal courts.

## 5. INTOXICATING LIQUORS

IN THE Liquor Enforcement Act of 1936<sup>98</sup> there appears a clause which is clearly adoptive in character. The purpose of this law was to afford protection to dry or semidry states against importations of intoxicating liquors, following the general mode of regula-

<sup>98</sup> Act of June 25, 1936, 49 *Stat.* 1928, 27 *U. S. C. A.* (1940 Supp.), secs. 221-228.

tion embodied in the Reed Amendment.<sup>99</sup> The 1936 statute sets up a prohibition against liquor shipments into states which have restrictive laws coming within its terms and provides appropriate penalties for violation of this prohibition. Section 3(b) of the law states that, in order to determine whether anyone is acting in violation of this prohibition, "the definition of intoxicating liquors contained in the laws of such State shall be applied, but only to the extent that sales of such intoxicating liquors . . . are prohibited in such State." In other words the applicability of the federal restrictive measure varies from state to state as the laws of the states differ in their definitions of the term "intoxicating liquors." If a "bone-dry" state should liberalize its liquor laws and legalize the sale of wine and beer of not more than 4 per cent alcoholic content, the terms of the prohibition in the federal act would automatically be modified in the same sense.

This provision has not been examined judicially as yet. On the basis of decisions in state courts involving state legislation of a similar character during the prohibition era it is adoptive. If given a prospective application it constitutes a delegation of legislative power to the states. State prohibition laws which were made to conform automatically with federal prohibition laws in their definition of intoxicating liquors were held by some state courts to delegate power to Congress, if given a prospective application.<sup>100</sup> Presumably the rule operates in both directions.

A possible ground for validation of this provision in the 1936 law may lie in the fact that the purpose of the act, as stated in the title, is "to enforce the Twenty-first Amendment." This amendment prohibits the shipment of liquors into any state in violation of its laws. In view of the liberal attitude so far manifested by the Supreme Court in interpreting this constitutional provision, it is conceivable that the Court would regard a federal prohibition couched in such terms to be within the scope of federal authority. The Court might well regard the act as an enforcement of this

<sup>99</sup> The genesis of the act and its applicability are discussed *supra*, pp. 287-288.

<sup>100</sup> *In re Opinion of the Justices*, 239 Mass. 606, 133 N. E. 453 (1921); *In re Intoxicating Liquors*, 121 Me. 438, 117 Atl. 588 (1922), *State v. Gauthier*, 121 Me. 522, 118 Atl. 380 (1922). Laws of this character were sustained in *Ex parte Burke*, 190 Cal. 326, 212 Pac. 193 (1923), and *Commonwealth v. Alderman*, 275 Pa. 483, 119 Atl. 551 (1923), but without consideration of the question of delegation of power.

constitutional prohibition, rather than an ordinary commercial regulation. The peculiar difficulties of controlling the liquor traffic which are recognized by the Twenty-first Amendment might be held to justify special measures of protection to be undertaken for the benefit of the dry states. Ordinary restrictions in the way of legislative coöperation between the nation and the states would for this reason be held inoperative.

## CHAPTER XI

### SUMMARY AND CONCLUSIONS

THIS study has been concerned with tracing the development of legislation by Congress which has had the effect of broadening the scope of state power in relation to commerce. It has also dealt with the development of Congressional practice in the use of the commerce power to supplement state legislation and to incorporate state laws by reference into a system of federal commercial regulation. Attention has been given primarily to the constitutional theory upon which such legislation has been founded. The ultimate objective has been a consideration of the significance of this legislation in reference to federal-state relations in the regulatory sphere covered by the commerce clause. From this study and analysis certain general conclusions emerge.

In the first place, it is apparent that the language of the opinions of the Court has not always been a true guide concerning the principles which apply in federal-state relations in the field of commercial regulation. The scope of federal and state power to regulate foreign and interstate commerce was left unsettled by the Constitution. In the plan set up by the founders the taxing authority of the states in relation to commerce was specifically limited, but in the general field of commercial regulation the states were subjected only to a superior controlling authority in Congress. From the beginning they proceeded to exercise power having a more or less direct bearing upon interstate and foreign commercial activities. By evolving the theory of exclusiveness of the federal commerce power, first upon a basis of total exclusion of the states from it and later by exclusion of them from it where the subjects of regulation were of national concern, the Supreme Court drew unto itself responsibility for keeping the states within bounds consistent with national interests. The Court likewise assumed responsibility for protecting the states against undue federal encroachment into the sphere of reserved state powers through the exercise of authority under the commerce clause.



In holding the states in check the Court proceeded upon the assumption that the grant of the commerce power to Congress imposed, *per se*, a constitutional disability upon the states. To annul state laws when there was no conflicting action by Congress or the treaty-making authority necessitated the formulation of guiding principles which the Court could follow in determining what acts of the states were permissible under the Constitution. Principles which could be applied as inflexible rules proved to be most difficult to formulate. The history of judicial interpretation of the commerce clause as a limitation upon state authority has been a continual search for formulas and rules that would enable a proper adjustment between national and local interests to be made. By its very nature, this adjustment requires a consideration of each individual case on its merits. Such consideration is a function essentially legislative in character. It involves setting the national commercial interests over against local interests and determining the relative weight to be attached to each. It requires the making of qualitative judgments which are incapable of being reached through application of inflexible rules.

In passing upon such questions the Supreme Court has had to appear to base its rulings on a finding of state competence to act under the Constitution. The Court has been forced to use the approach of a constitutional construction to achieve results which were actually based upon considerations of policy. For this reason the ritual of language employed by the Court in justifying a finding in a particular case has sometimes involved an endorsement of broad principles which go much further than the Court actually intends to go in making its decision. Comparison of the language of the cases will reveal apparently irreconcilable statements of principle. In denying the validity of state laws in one instance the Court may employ language which appears to bar the states completely from the field of commercial regulation. Yet in another case upholding the validity of other state laws in relation to commerce it may employ language seemingly conceding to the states practically a subordinate concurrent authority with Congress in this field. The reserved powers of the states are held to operate as a barrier to extension of federal power under the commerce clause in one instance; yet in another instance the superior authority of Congress is not held to be so limited.

Those who profess to see in doctrine their only guide to con-

stitutional construction will be baffled in trying to formulate a completely consistent theory that will embrace all the decisions of the Court on the division of power between Congress and the states in commercial regulation. Doctrines applied by the Court in this phase of constitutional interpretation are significant in producing a particular result, but they do not afford a safe ground for broad generalization. The rulings of the Court have often been supported by language which confuses rather than clarifies. One may agree with the general result of the Court's functioning as a censor of state and federal laws in the commercial sphere. But if one seeks a comprehensive doctrine which will cover all its decisions, the most that can be said is that the successive rulings of the Court have been concerned solely with the production of a uniform result, viz., the protection of essential national and local interests without undue restriction upon either state or federal legislative authority. While this may not be sufficiently clear and definite to warrant its designation as a "doctrine," it is a generalization which is appropriate to the results. A liberal judicial attitude toward coöperative action with the states by Congress under the commerce clause appears to be an important element of this "doctrine."

By its rulings the Court has accorded Congress authority to define positively the limits of state police powers in respect to importations of certain classes of goods. This has been achieved through judicial recognition of Congressional power to divest goods of the protection of exclusive federal jurisdiction over them and thus subject them to the operation of state police-power regulations. To assure protection of commerce against invidious state restraints the framers of the Constitution delegated authority over interstate and foreign commerce to Congress. In reference to taxation the controlling authority of Congress was specifically recognized by clauses requiring Congressional assent to state tonnage and import and export tax measures. The development of the divestment theory represents essentially an extension of the principle of the tax clauses to state regulation of imports in general.

As the Supreme Court proceeded in an ever-increasing number of cases to pass upon the limits of state authority over imported goods under the commerce clause, it came to rest its judgment in part upon a coincidence in the result reached and the will of Congress. Various evidences of the will of Congress on the admissi-

bility of given forms of state regulatory action were taken into account. This eventuated at length in the "silence-of-Congress" doctrine, in accordance with which the Court drew implications from the inactivity of Congress either to sustain or to deny state authority to reach imported goods with regulatory laws. The idea of an absolute and irrevocable exclusion of state authority as derived from immutable constitutional limitations gave way to the concept of a qualified exclusion, enforced as a matter of Congressional direction.

Judicial deference to Congressional will was at length carried to the point of permitting a positive declaration of attitude by Congress to overrule the Court's finding regarding the limits of state police power over incoming shipments of goods under the commerce clause. By giving effect to a denial of the negative implications drawn from the silence of Congress, the Court permitted the states to exercise regulatory power over original-package shipments of specified commodities. The "incidental" right of disposition of such original-package goods, which had previously been held by the Court to be beyond the regulative authority of the state, was subjected to state control by Congressional direction.

Later this extension of state authority by Congressional act was carried to the point of sanctioning control by the destination state over an entire interstate transaction. This was achieved by a federal de-legitimization of commerce in a given commodity, where the intent of the parties involved in the transaction was to consummate a violation of the laws of the destination state. Although in sustaining such divesting acts of Congress the Court did not concede in so many words that Congress might thus redefine the limits of state power to regulate interstate and foreign commerce, that was essentially the result. By releasing state police powers held in restraint by its own "exclusive" power of regulation, Congress permitted the states to legislate in a manner previously forbidden them according to the Court's interpretation of the commerce clause as a limitation upon state power.

The question may well be raised whether the Court will not eventually abandon the practice of overthrowing state legislation on the ground of invasion of an exclusive, but unexercised, federal power over commerce, and come to rely wholly upon positive declarations by Congress either sanctioning or prohibiting state action as a basis for determining the scope of state authority over

commerce. Evidences of a readiness by some members of the present Court to adopt such an attitude toward an ever-widening range of subject matters are clearly discernible, but it is improbable that the Court will soon concede to Congress complete responsibility in this regard. The Court must necessarily move slowly in resigning to Congress the function of guarding national commercial interests against burdensome and mischievous state legislation; Congress has shown no disposition as yet to legislate in a comprehensive manner on the subject of state power in relation to interstate commerce. Until it has undertaken to deal with this problem the Court must continue to annul state laws because of conflict with the constitutional grant to Congress of power over interstate and foreign commercial regulation.

The authority of Congress to cooperate with the states by the adoption of federal prohibitions of commerce contingent upon an intended or consummated violation of state laws has also been established. The Supreme Court has countenanced the employment of the federal commerce power thus to reinforce state laws. By recognizing the authority of Congress to adjust its commercial regulatory policies to those of the states so as to establish federal sanctions for violations of state laws, the Court has enabled Congress to give a wider range of effectiveness to state laws than would be possible through unaided state action. Where this form of federal assistance to the states has been employed with reference to state laws governing the movement of goods or persons into or out of the state, federal and state laws regulating commerce have been knit together into one system. State legislative bodies have become agents of Congress in determining the conditions under which federal sanctions shall apply. State regulations are inferentially adopted as a part of the federal system of regulation. State laws give federal regulations form and substance by determining the points of their application.

The result of these developments has been the establishment of authority in Congress to determine, in some measure at least, the limits of state power to regulate interstate and foreign commerce. It may recognize state enactments and give them binding effect in this sphere. In deferring to the judgment of Congress in this regard the Supreme Court has tacitly recognized that the determination of the question whether state laws shall have an operative effect upon interstate and foreign commerce is essentially

a legislative function. This authority is conceded to belong to the body which is charged with the responsibility of regulating such commerce under the Constitution.

How far Congress may be permitted to proceed in sanctioning state regulation of interstate and foreign commerce by these modes of action which have won judicial approval is a question which has not yet been fully answered in the Court's opinions. The Court has made clear in the prison-made-goods cases that the authority of Congress to sanction state regulation of original-package sales in a given commodity, or to prohibit commerce when carried on with an intent to violate state laws, is not limited to goods inherently harmful and for that reason subjected to state police-power regulation. The power of Congress to subject goods to state police and revenue powers by the process of divestment appears to be governed by the same constitutional limitations as the police and revenue powers of the states. If the states may regulate or prohibit intrastate commerce in a given subject matter, Congress may come to their aid by removing the commerce-clause barrier to effective state control over importations. It may also close the channels of interstate commerce to those who would use them to circumvent these state laws. In view of judicial rulings already made, it appears improbable that the Court will discover limitations in the "exclusiveness" of the federal commerce power which will prevent a more extended use of these forms of regulation by Congress. It would be irony indeed if the Court should convert the doctrine which it advanced to protect the federal commerce power against state encroachments into a limitation upon Congress in the choice of means in exercising this power.

There are, however, conceivable constitutional limitations upon the power of Congress to regulate commerce by divesting it of the protection of exclusive federal jurisdiction, or by conditioning federal regulations upon violations of state laws, or by inferentially adopting state laws. Whether the power of Congress to regulate interstate commerce by the divestment and conditional-prohibition methods is contingent upon the existence of a Congressional authority to prohibit this commerce independently of state action has not been made clear by the Court. Strong reasons can be advanced to support the conclusion that federal authority to sanction state prohibition of commerce and to prohibit commerce conditionally upon an intended or consummated violation of state law must

imply existence of power to prohibit such commerce independently of state action. If this is true the limitations upon the use of these coöperative methods of regulation by Congress are the same as the limitations upon the power of Congress to prohibit commerce independently of state action.

Other possible limitations exist. Congress is limited in the exercise of the commerce power by the guarantee of due process of law in the Fifth Amendment. Relying upon this clause as a basis, the Court might well hold that subjection of a particular phase of commerce to a regime of control founded on state laws imposes unreasonable restraints upon commerce and is therefore invalid. Principles which are inherent in the federal division of powers have been found to prevent use of the federal taxing power to apply sanctions for nonobservance of state laws. The same principles might be called into play to overthrow an undue use of the commerce power to the same end. Moreover, in two instances the Court refused to give heed to an expression of Congressional will that state laws should govern in the matter of workmen's-compensation benefits for harbor workers. An implied constitutional requirement of uniformity of rule which Congress could not ignore was enforced by the Court, even though the matter dealt with was one within the legislative competence of Congress. It is therefore not inconceivable that the Court might for similar reasons refuse to permit diversity of commercial regulation in some matter which Congress might wish to leave to the governance of the states.

It is unlikely that the Supreme Court will be required to define the ultimate limits of Congressional authority to extend state powers over interstate and foreign commerce by the methods which have been described in this study. The restraints which will probably operate to prevent undue exercise of Congressional authority in this direction are political in nature rather than constitutional. Legislation supporting state regulation of commerce runs counter to the general trend toward national uniformity and centralization of control in commercial affairs. The most far-reaching proposals of this type have been rejected in Congress because of the undesirable results foreseen. The concern of Congress has more often been manifested toward eliminating diversified regulation of commerce by the states than toward perpetuating and intensifying it. Only on rare occasions has the Court restricted

state authority to such a degree that Congress has been impelled to enact legislation in order to overcome the effect of its rulings. The employment of federal legislative power to prohibit commerce carried on with the intent to violate state laws has been due entirely, or in large part, to a belief that power was lacking in Congress to regulate directly the matters dealt with in this manner. Where Congress has an acknowledged power to regulate independently of state action, this cooperative method of regulation assumes the character of a temporizing expedient which is eventually supplanted by direct national control. Hence it is to be expected that coöperative regulation will ordinarily be resorted to as a means of reaching only those matters that Congress is unable to reach by direct federal regulation.

The chief significance of the developments covered in this study lies in the fact that they demonstrate that the Court's interpretation of the Constitution has been brought far from the apparently immutable principles and dogmas of an earlier era. In sustaining cooperative legislation, or tacitly approving it, the Supreme Court has permitted a degree of flexibility in federal-state relations under the commerce clause which a rigid division of authority in accordance with the concept of dual federalism would deny. In no field is there greater need for continual readjustment between national and state authority and for federal-state cooperative action in general. Judicial support of legislation designed to break down the rigid division of authority between the nation and the states constitutes a recognition of the fact that in the regulation of commerce protection of the general welfare involves a balancing of national and local interests against one another. It recognizes further that in achieving this balance priority shall be given to the views of the body charged by the Constitution with the regulation and protection of national commercial interests. The Court has not permitted a rigid adherence to doctrine or precedent to stand in the way of an adjustment in the allocation of power favored by the politically responsible branches of government. It has viewed national and state governments, not as jealous rivals for power, but as responsible agencies of the people working for a common end—the general public welfare.

On the basis of the language of the opinions it is apparent that the Court has exposed itself to criticism for inconsistency of statement. Although the Court denies that Congress can "delegate"

power to the states, it is all too evident that judicial sanction has been given to laws which, in a broad sense, do make the states the legislative agents of the nation. The Court holds that the states may not regulate matters falling within the "exclusive" jurisdiction of Congress under the commerce clause. Nevertheless, it has sustained state regulation of such matters upon the basis of Congressional authorization. The Court maintains that Congress has no general power to apply federal sanctions for the enforcement of state laws upon subjects to which federal power does not extend; yet it has upheld the use of the commerce power for such purposes.

Even though the rulings of the Court on the matters covered in this study do not fit into a neat, logical pattern when surveyed in the light of well-established principles underlying federal-state relations in general, they constitute a consistent whole in one respect. The Court has been consistently liberal on the question of Congressional power to cooperate with the states through acts passed under the commerce clause. It has adopted the wise and statesmanlike course of permitting the responsible legislative agency of the nation to regulate interstate and foreign commerce in the manner deemed compatible with the public interest. Violence may have been done to long-established constitutional doctrines, but harmonious relations between the national government and the states in the control of matters of mutual concern have been thereby made possible.





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